Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES OF AMERICA
October Term, 1993

BEXAR COUNTY APPRAISAL REVIEW BOARD
and BEXAR COUNTY APPRAISAL DISTRICT,
PETITIONERS

V.

FIRST BAPTIST CHURCH OF SAN ANTONIO
and VALERO REALTY COMPANY,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH COURT OF APPEALS DISTRICT OF TEXAS, SAN ANTONIO

PETITION FOR WRIT OF CERTIORARI and APPENDIX, VOLUME I

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57 pp

Questions Presented for Review

Does a state's property tax exemption scheme, as interpreted by its courts, violate the First and Fourteenth Amendments to the United States Constitution when religious organizations are more favorably treated than similarly qualified secular organizations?

Does the judicial application of a state's property tax exemption laws violate the First and Fourteenth Amendments when, in order to qualify for an exemption, the state is required to subjectively determine, on a case by case basis, whether property owned by a religious organization is primarily used for religious worship?

Do the First and Fourteenth Amendments prohibit a state from granting property tax exemptions to churches or other religious organizations that use their property for commercial profit making purposes?

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The opinion of the Texas Supreme Court denying discretionary review of the Petitioners' First Amendment issue and remanding such issue to the Fourth Court of Appeals for disposition is reported at First Baptist Church of San Antonio v. Bexar County Appraisal Review Board, 833 S.W.2d 108, 111, 112 & n.4 (Tex. 1992). It is reprinted at App. Vol. I, pp. 27a; 31a, n.4.

The opinion of the Fourth Court of Appeals, overruling Petitioners' First Amendment arguments on remand from the Texas Supreme Court is reported at Bexar County Appraisal Review Board v. First Baptist Church, 846 S.W.2d 554, 557-559 (Tex. App. - San Antonio 1993, writ denied). It is reprinted at App. Vol. I, pp. 1a; 3a-7a. The original opinion of the Fourth Court of Appeals, on remand, dated November 12, 1992, which was subsequently withdrawn, is not reported. It is reprinted in relevant part at App. Vol. II, p. 48a.

The order of the Texas Supreme Court entered on June 3, 1993, denying discretionary review of the Fourth Court of Appeals decision after remand is unreported. It is reprinted at App. Vol. II, p. 52a.

The order of the Texas Supreme Court, dated October 27, 1993, denying Petitioners' Motion for Rehearing on the First Amendment issue is unreported but is reprinted at App. Vol. II, p. 54a.

The final judgment of the State District Court, rendered July 17, 1989, incorporating the jury's findings is not reported. It is reprinted at App. Vol. II, p. 56a.

JURISDICTION

The Texas Supreme Court denied discretionary review by an Order, dated June 3, 1993, with the notation "Writ Denied." (App. Vol. II, pp. 52a-53a) A timely filed Motion for Rehearing was overruled by the Texas Supreme Court on October 27, 1993. (App. Vol. II, pp. 54a-55a) This Petition is filed within ninety (90) days after entry of that Order. Jurisdiction is invoked pursuant to 28 U.S.C. §1257.

The grounds upon which the jurisdiction of this Court is invoked is that the final ruling of the Texas Supreme Court denying discretionary review is reviewable by Writ of Certiorari where any right set forth is specifically claimed under the Constitution of the United States.

Petitioners claim that the Texas property tax exemption laws, as judicially interpreted by State court decisions, violate the Establishment Clause of the First Amendment to the Constitution, as applied to the States through the Fourteenth Amendment, because exempting church owned property used for a profit-making commercial enterprise constitutes a government subsidy of religion which excludes similarly organized secular organizations. Further, the application and administration of such exemptions results in excessive government entanglement with religion and is not uniformly applied.

The trial court's judgment became final when the Texas Supreme Court denied Petitioner's Motion for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIRST AMENDMENT

The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

FOURTEENTH AMENDMENT

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> No State shall make or enforce any law which shall ... deny any person within its jurisdiction the equal protection of the laws.

TEXAS TAX CODE ANNOTATED SECTION 11.20

Tex. Tax Code Ann. §11.20 provides, in relevant part:

(a) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of:

> (1) the real property that is owned by the religious organization, is used primarily as a place of regular religious worship, and is reasonably necessary for engaging in religious worship;...

(d) Use of property that qualifies for the exemption prescribed by Subdivision (1) or (2) of Subsection (a) of this section for occasional secular purposes other than religious worship does not result in loss of the exemption if the primary use of the property is for religious worship and all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship.

(e) For the purposes of this section, "religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage, and commitment in behalf of a religious faith.

[Full text is reprinted at App. Vol. II, pp.99a, 101a.]

STATEMENT OF THE CASE

This is an appeal from a decision of a Texas Court of Appeals holding that the State's property tax exemption laws do not violate the Establishment of Religion Clause of the First Amendment to the United States Constitution. Such decision affirms the judgment of a State District Court ordering Petitioners to remove from the property tax rolls of Bexar County, Texas, parking lots owned by First Baptist Church which are used by the Church for a profit-making commercial enterprise.

The First Baptist Church of San Antonio is located in downtown San Antonio, Texas. The Church owns four (4) parking lots; two (2) are adjacent to the Church sanctuary, the other two are located nearby the corporate headquarters of Valero Energy Corp.

The Church leases the two parking lots closest to Valero's headquarters to Valero Realty Company ("Valero"), a subsidiary of Valero Energy Corporation. Valero pays the Church over $100,000 per year for the use of these two parking lots.

Under the terms of its Lease Agreements with the Church, Valero has exclusive possession of these two parking lots five (5) days a week between the hours of 7:30 a.m. and 5:00 p.m. Valero permits the Church to use these two lots on business days after 5:00 p.m., Sundays and occasional holidays. The Church actually uses the two leased lots primarily on Sundays. Valero is responsible for all the upkeep and maintenance on the two leased parking lots and is further responsible for the payment of all property taxes over and above the 1979 tax rate. The market value of the two leased parking lots is over $2,000,000.

The Bexar County Appraisal District, a political subdivision of the State, Tex. Tax Code Ann. §6.01(c)(Vernon 1992); (App. Vol. II, p. 96a) is charged with ensuring that tax exemptions are properly granted. Tex. Tax Code Ann. §11.45(a)(Vernon 1992) (App. Vol. II, p. 102a). The District's Chief Appraiser denied the Church its property tax exemptions for

1984-1986 on the two parking lots leased to Valero. The Church protested the Chief Appraiser's decision to the Appraisal Review Board of Bexar County, Texas, which upheld the Chief Appraiser's decision. The Church, later joined by Valero, filed suit in the 225th Judicial District Court of Bexar County, Texas, to force the Bexar Appraisal District to exempt the parking lots from taxation. All other Church property not used for commercial purposes, including the parking lots closest to the sanctuary, are exempt from property taxes.

Before trial on the merits, Petitioners raised their constitutional issues in *Defendants' Second Amended Original Answer* (App. Vol. II, pp. 61a-63a) which was argued before the trial judge prior to trial at a hearing on *Defendants' Motion to Dismiss and Memorandum of Law* in support thereof (App. Vol. II, pp. 64a-66a; pp. 67a-71a). Petitioners' Motion was overruled by the trial judge. (App. Vol. II, pp. 72a-79a) The District's challenge to the constitutionality of the statute was again raised in *Defendants' Motion for New Trial* (App. Vol. II, pp. 80a-82a; 83a-85a) which was overruled by the trial judge (App. Vol. II, pp. 86a-87a).

On January 29, 1990, Petitioners filed their Appellant's Brief with the Fourth Court of Appeals District of Texas, San Antonio, under docket number 04-89-00543-CV, and asserted as their fourth point of error:

> The trial court erred in granting judgment for the Church/Valero because, as a matter of law, the granting of an exemption in this case violates the First Amendment to the United States Constitution...
>
> (App. Vol. II, pp. 88a-91a)

The Fourth Court of Appeals in its first opinion reversed the judgment of the trial court finding that the Church failed to present any evidence establishing the parking lots were used primarily for religious purposes as required by law. (Bexar County

Appraisal Review Board v. First Baptist Church, 800 S.W.2d 892 (Tex. App. - San Antonio 1990). App. Vol. I, pp. 19a-26a). The Texas Supreme Court thereafter granted the Church/Valero's Application for Writ of Error, reversed the decision of the Court of Appeals and remanded Petitioners' federal constitutional question to the Court of Appeals for disposition. (First Baptist Church of San Antonio v. Bexar County Appraisal Review Board, 833 S.W.2d 108, 111, 112 & n.4 (Tex. 1992); App. Vol. I, pp. 27a-31a, n.4). The Fourth Court of Appeals on remand held that the State's exemption laws do not violate the Establishment Clause of the First Amendment. (Bexar County Appraisal Review Board v. First Baptist Church, 846 S.W.2d 554, 557-559 (Tex. App. - San Antonio 1993, writ denied); App. Vol. I, pp. 1a, 3a-7a). The District's Motion for Rehearing on this issue was overruled by the Fourth Court of Appeals. (App. Vol. I, pp. 1a; 18a) Petitioners' Application for Writ of Error to the Texas Supreme Court on this point was denied, on the 3rd day of June, 1993, with the notation "Writ Denied". (App. Vol. II, pp. 52a-53a). The District's Motion for Rehearing before the Texas Supreme Court was denied on October 27, 1993. (App. Vol. II, pp. 54a-55a).

REASONS FOR GRANTING THE WRIT

The Decision Below Is In Direct Conflict With The First Amendment Principles Established By The Applicable Decisions Of This Court

In rejecting the District's constitutional arguments brought forward here, the Fourth Court of Appeals misinterprets and misapplies the minimum First Amendment standards set out in Walz v. Tax Commission, 397 U.S. 664 (1970) and its progeny.

Unlike the New York property exemption statute in Walz, which passed constitutional muster, the Texas statutory scheme for granting property tax exemptions violates the Establishment Clause of the First Amendment because:

-As applied by lower state court decisions it requires excessive government entanglement with religion on a "case by case" basis.

-As interpreted by lower state court decisions it is not neutral; it favors religious organizations over secular organizations.

-It results in a government-sponsored subsidy for religion in general and certain churches in particular.

-It is not equal in its application or results.

The Texas Statute Requires Government Intervention In Religious Activities On A "Case By Case" Basis.

The Texas Supreme Court in setting out the evidentiary standard governing the application of the Texas statute in this case and in the case of City of Austin v. University Christian Church, 768 S.W.2d 718 (Tex. 1988), removed any objective standard for measuring the primary use of the property for religious purposes and replaced it with a subjective test. (What does the church use the property for instead of what is the actual use of the property?) This qualitative approach[1] requires each of the State's 254 chief appraisers to first determine whether religious activities meet the State's statutory definition of "religious worship", i.e.:

> For the purposes of this section, "religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage, and commitment in behalf of a religious faith.

Tex. Tax Code Ann. §11.20(e)(Vernon 1992); (Cf. full text, App. Vol. II, pp. 99a-101a). The Chief Appraiser must then examine the motives and purposes of the religious organization's use of its

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1 First Baptist Church of San Antonio v. Bexar County Appraisal Review Board, 833 S.W.2d 108, 111 (Tex. 1992), (App. Vol. I, p. 30a).

property to determine whether the property is primarily used for religious worship. Tex. Tax Code Ann. §§11.20(a)(1); 11.45(a), (c) (Vernon 1992); (App. Vol. II, pp. 99a; 102a). If the exemption is denied, the church or religious organization must file an administrative protest with another government entity, the Appraisal Review Board. Ultimately, any religious organization denied an exemption may then file suit in District Court for a trial de novo and have the exemption issue determined by judge or jury. Tex. Tax Code Ann. §§42.21; 42.23(c) (Vernon 1992) (App. Vol. II, p. 102a). This is precisely the type of government supervision criticized in Lemon v. Kurtzman, 403 U.S. 602, 620 (1971) when this court stated:

> This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.

The Texas Statute Is Not Neutral; It Favors Religious Organizations Over Secular Organizations.

The Texas tax exemption scheme as interpreted and applied by lower state court decisions, imposes stricter standards for exempting secular organizations than it does for religious organizations. Secular organizations are entitled to a tax exemption only if the property is used "exclusively" by a qualified organization for its proper purpose (Cf., Tex. Tax Code Ann. §§11.11 (Vernon 1992),[2] 11.18 (Vernon Supp. 1994), 11.19 (Vernon 1992), 11.181 (Vernon Supp. 1994), and 11.21 (Vernon 1992); (App. Vol. II, pp. 96a; 97a; 98a; 97a; 101a.) Property owned by religious organizations is exempted under the much

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2 Under this section of the Tax Code even State-owned property loses its tax exempt status if its "property is rented or leased for compensation to a private business enterprise to be used by it for a purpose not related to the performance of the duties and functions of the State agency...". Yet, religious property leased under the same circumstances keeps its state sponsored property tax exemption.

more liberal standard of "primary use". The more liberal standard for religious organizations was expressly acknowledged and approved by Justice Cook in the Texas Supreme Court's opinion on the evidentiary question presented in this case when Justice Cook stated in his concurring opinion:

> This liberality is particularly evident in the current statute granting a tax exemption for real property used primarily as a place of regular religious worship. Section 11.20(a)(1) grants the exemption based on *primary use*, not *exclusive use*.

(Court's emphasis, First Bapt., 833 S.W.2d at 112; App. Vol. I, p. 33a). Justice Cook goes on to say that the legislature intended that property used for religious worship be granted exemptions more liberally than property not so used because the legislature "intentionally and carefully" made the distinction between "primary" and "exclusive." Id. at 112; App. Vol. I, p. 33a. This inequality in statutory construction and application of Texas' property tax exemption laws, favoring religious organizations over otherwise qualified secular organizations, is graphically demonstrated in Bexar Appraisal District v. Incarnate Word College, 824 S.W.2d 295, 297 (Tex. App. - San Antonio 1992, writ denied), where the same Fourth Court of Appeals which upheld the exemption for First Baptist denied a college institution an exemption for property used "primarily" as a private residence rather than "exclusively" for educational functions. The Fourth Court of Appeals in support of its decision cited opinions of the Texas Supreme Court calling for "strict construction" of exemption statutes. Id. at 297; Bullock v. Nat'l Bancshares Corp., 584 S.W.2d 268, 271-72 (Tex. 1979), cert. denied, 444 U.S. 1016, 100 S.Ct. 667, 62 L.Ed.2d 645 (1980) (franchise taxes); Hilltop Village, Inc. v. Kerrville Indep. School Dist., 426 S.W.2d 943, 948 (Tex. 1968) (home for the aged not exempt from ad valorem taxation); River Oaks Garden Club v. City of Houston, 370

S.W.2d 851, 855 (Tex. 1963) (because nonprofit organization was not institution of purely public charity, it was not exempt from taxation). Obviously, the Texas courts apply a less strict exemption standard for religious organizations than they do for secular organizations. This standard fails the Lemon test (Lemon, 403 U.S. at 612) requiring that any such statute must have a secular legislative purpose.

The Texas Statute Effectively Constitutes A Government Subsidy For Religion In General And Certain Churches In Particular.

As noted by Justice Mauzy of the Texas Supreme Court in his dissenting opinion in this case:

> ... tax exemptions and preferences constitute indirect public subsidies that are every bit as real as the direct expenditure of public monies.

(First Bapt., 833 S.W.2d at 118; App. Vol. II, p. 45a)

Petitioners would go even further and state that when a State, either administratively or judicially, exempts from taxation church property hired out for commercial profit, it is in fact granting a direct subsidy to religious organizations with no corresponding benefit to like commercial secular enterprises (i.e., other commercial parking lots) which markedly burdens non-exempt property owners.

Moreover, a scheme that allows church property to be utilized for commercial purposes ultimately results in one privileged denomination being subsidized at government expense without equal benefit to other denominations that are either unwilling or unable to utilize their property for non-religious commercial purposes. In Everson v. Board of Education, 330 U.S. 1, 15 (1947) this court said: "Neither a state nor the federal government can ... pass laws which aid one religion, aid all religions, or prefer one religion over another."

The Texas Exemption Statute Is Not Equal In Its Application Or Results.

The case by case qualitative analysis mandated by the Texas Supreme Court requires each of the State's 254 chief appraisers and/or appraisal review boards to make subjective decisions as to which churches or religious organizations qualify for a property tax exemption. This is a standard which leads to an unequal application of the law and results in selective government sponsorship of one church over the other. Of the two reported cases on this issue of commercial use of church property in Texas, of which this case is one, this unequal application of the law and its consequences have already been demonstrated. An Austin Court of Appeals, on remand, following the guidelines of the Texas Supreme Court held, based on the jury's findings, that a church's leased parking lots were not used primarily for religious purposes. The church's exemption was denied. (University Christian Church v. City of Austin, 789 S.W.2d 361, 366 (Tex. App. - Austin 1990, no writ). In this case, faced with identical law and virtually the same facts, the San Antonio Court of Appeals on remand, held, based on the jury's findings, that the church's leased parking lots were entitled to a tax exemption.[3] (Bexar County Appraisal Review Board v. First Baptist Church, 846 S.W.2d 554 (Tex. App. - San Antonio 1993, writ denied); (App. Vol I., p. 1a)

THE DECISION BELOW INVOLVES AN ISSUE WHICH NEEDS TO BE RESOLVED BY THIS COURT

This Court, when necessary, has repeatedly distinguished and clarified the Walz decision when it has been misapplied or

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[3] Four other churches in San Antonio also use their parking lots for commercial purposes and do not currently enjoy a property tax exemption (App. Vol. II, pp. 92a-94a). If each case is decided on a "case by case" basis without any constitutional standards to follow, one church, such as First Baptist, will enjoy a tax exemption on its leased parking lots, while its next-door neighbor might not, thereby allowing one church the benefit of government sponsored support to the detriment of another church that would not enjoy such support.

misinterpreted by lower courts in order to ensure that the Establishment Clause of the First Amendment is not violated; e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971); Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

Here, the Texas Supreme Court refused to review Petitioners' constitutional challenges even when the dissent in City of Austin (City of Austin, 768 S.W.2d at 721) and in this case raised constitutional alarms over the consequences of the majority's opinion (App. Vol II, pp. 37a; 44a). In this case, Justice Cook, concurring in the majority opinion, expressly adopts the constitutional standards previously rejected in Walz.[4] (Walz, 397 U.S. at 674). The Texas Supreme Court has, in effect, condoned an unconstitutional interpretation and application of the Texas statutory exemption scheme by letting stand the appeals court opinion in this case holding that commercial use of a church's property is constitutionally permissible.

CONCLUSION

In short, the Texas property tax exemption scheme, as interpreted by Texas Courts, fails to meet the minimum First Amendment standards repeatedly upheld by this court in its prior decisions.

As applied by the Texas courts, these First Amendment safeguards are ignored when the State's laws are subjectively and

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[4] Judge Cook's opinion as earlier noted states that the legislative purpose of the State's property exemption law was to favor religion. Moreover, in his explanation of why Texas favors granting religious exemptions, Justice Cook adopts the "good works" and social benefits theory specifically rejected in Walz. (First Bapt., 833 S.W.2d at 114; App. Vol. I, p. 36a) Justice Cook, in doing so, ignores the implications in Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 316 F. Supp. 1116 (S.D. Fla. 1970), vacated as moot when the Florida legislature amended its property tax laws to exclude exemptions of church property used for commercial purposes, 404 U.S. 412 (1972), on the grounds that the Texas statute in this case was not yet challenged in the federal system. (First Bapt., 833 S.W.2d at 113, n.1, App. Vol. I, pp. 34a-35a, n.1.)

selectively interpreted to favor religious exemptions over secular, thereby resulting in the twin evils of government sponsorship of religion and excessive state entanglement with religion.

Accordingly, for the reasons stated, the judgment of the trial court declaring these commercially used church parking lots exempt from taxation should be reversed.

Respectfully submitted,

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COURT OF APPEALS

FOURTH COURT OF APPEALS DISTRICT OF TEXAS

SAN ANTONIO

OPINION

Appeal No. 04-89-00543-CV

BEXAR COUNTY APPRAISAL REVIEW BOARD, et. al.,

Appellant

v.

FIRST BAPTIST CHURCH, et. al.,

Appellee

Appeal from the 224th District Court of

Bexar County

Trial Court No. 84-CI-20348

Honorable Carolyn H. Spears, Judge Presiding

ON APPELLANTS' MOTION FOR REHEARING

Opinion by: David Peeples, Justice

Sitting: Blair Reeves, Chief Justice

Shirley W. Butts, Justice

David Peeples, Justice

Delivered and Filed: January 20, 1993

APPELLANTS' MOTION FOR REHEARING DENIED;

JUDGMENT AFFIRMED AS REFORMED.

The motion for rehearing is overruled. Our previous opinion is withdrawn and replaced by the following.

Earlier in this property tax exemption case, we held that the evidence was legally insufficient to support the jury's finding that a church parking lot was used primarily for religious purposes. Bexar County Appraisal Review Bd. v. First Baptist Church, 800 S.W.2d 892 (Tex. App.--San Antonio 1990). The supreme court disagreed with that ruling and returned the cause to us for consideration of points of error that we did not reach. First Baptist Church v. Bexar County Appraisal Review Bd., 833 S W 2d 108 (Tex. 1992).

Appellants Bexar County Appraisal Review Board and the Bexar Appraisal District (collectively referred to as the district) appeal from a judgment based on a jury finding that two parking lots owned by the First Baptist Church of San Antonio and leased to the Valero Realty Company are exempt from property taxes for 1984-1986. The judgment ordered that the value of the property on the appraisal roll be reduced to zero, and decreed that the property is exempt from taxation for the three years. The judgment also awarded the church attorney's fees. Additional facts may be found in the two reported opinions.

The district complains that: (1) the judgment exempting the property from taxation is unconstitutional, (2) the award of attorney's fees was unauthorized, and (3) the court made certain erroneous rulings during trial.[1] In one cross-point, the church and Valero seek damages on the ground that the district's claim of unconstitutionality is frivolous and was made for purposes of delay. The district also contends that the evidence is factually insufficient, but the supreme court held the evidence legally sufficient, and in view of its construction of the exemption statute, we hold that the evidence is factually sufficient as well.

I.

We consider first the district's contention that the exemption violates the Texas Constitution, which mandates a tax exemption for "actual places of religious worship" and states that "all laws exempting property from taxation other than the property mentioned in this Section shall be null and void." TEX. CONST. art. VIII, § 2. The district argues that the parking lot at issue in this case is not an actual place of religious worship, and that to exempt it from property taxation goes beyond article eight, § 2 and is void.

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[1]The district also argues that the trial court erred in its submission of jury question one and its accompanying instructions. The supreme court dismissed that argument as meritless and we need to consider it further. See 833 S.W.2d at 110 n.2. Contrary to the district's suggestions, the issue did not improperly comment on the weight of the evidence or advise the jury of the effect of its answers.

The exemption for a church parking lot leased to a private corporation certainly does not appear to fall within a common-sense reading of the constitution's language, "actual places of worship." But the supreme court has twice stated that "a parking lot may qualify as a place of religious worship." First Baptist Church v. Bexar County Appraisal Review Bd., 833 S.W.2d at 110; City of Austin v. University Christian Church, 768 S.W.2d 718, 719-20 (Tex. 1988). In University Christian Church, the court said, "For purposes of the tax exemption, a place of religious worship includes not only the sanctuary, but also those grounds and structures surrounding the sanctuary which are necessary for the use and enjoyment of the church." Id. at 719. At bottom, the district asks us to adopt the argument made by the dissent in University Christian Church. Though the majority in University Christian Church did not specifically address the constitutional argument, it clearly did not accept it. The supreme court has held that a parking lot may constitute a place of worship under the statute, and the jury has found that it does in this case. In the face of the supreme court's considered statements, quoted above, we cannot fairly hold that a parking lot is not an actual place of worship under the constitution.[2] We hold that the exemption before us does not violate article eight, § 2.

We next consider the district's argument that the tax exemption violates the First Amendment to the United States Constitution. Generally a statute violates the establishment clause only if (1) it is motivated wholly by an impermissible purpose; (2) its primary effect is to advance religion; or (3) it excessively entangles church and state. See Bowen v. Kendrick, 487 excessively entangles church and state. See Bowen v. U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988); Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The United States Supreme Court

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[2]We are aware that the constitution refers to "actual" places of worship, while the statute does not use that term. Nevertheless, we conclude that it would violate the spirit of the court's two decisions to distinguish them on this basis.

used a slightly different analysis in upholding a similar property tax exemption in Walz v. Tax Commission, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). The statute before us satisfies each standard.

The Court in Walz stressed that the religion clauses mean that such exemptions must be neutral in purpose and effect:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.

Id. at 669, 90 S.Ct. at 1411-12, 25 L.Ed.2d at 701-702 (emphasis added). The Court then reasoned that the exemption did not have an improper purpose or an entangling effect, and that it was consistent with the uninterrupted historical practice of benevolent state and congressional neutrality toward religion in this country. The purpose of the tax exemption, said the Court in Walz, "is neither advancement nor the inhibition of religion; it is neither sponsorship nor hostility....[The state] has not singled out one particular church or religious group or even churches as such; rather, it has granted

exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." Id. at 672-73, 90 S.Ct. at 1413, 25 L.Ed.2d at 703-704. That is, the exemption for church property was part of a general tax exemption for a broad variety of nonprofit, charitable activities. The statute did not attempt to establish religion; it simply "spar[ed] the exercise of religion from the burden of property taxation levied on private profit institutions." Id. at 673, 90 S.Ct. at 1414, 25 L.Ed.2d at 704.

Nor did the statute have the effect of excessive governmental entanglement with religion. Both taxation and exemption would require some involvement with religion. "The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches." Id. at 675, 90 S.Ct. at 1414, 25 L.Ed.2d at 705. "The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches." Id. at 676, 90 S.Ct. at 1415, 25 L.Ed.2d at 705.

Finally, the Court reasoned that constitutional interpretation should not stray too far from its historical moorings. Cardozo had warned about the "tendency of a principle to expand itself to the limit of its logic."[3] The Court replied that history sets limits on the step-by-step expansion of legal rules; "such expansion must always be contained by the historical frame of reference of the principle's purpose." Id. at 679, 90 S.Ct. at 1416, 25 L.Ed.2d at 707. The Court noted that in an 1886 case it had accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment." Id. at 680, 90 S.Ct. at 1417, 25 L.Ed.2d at 708, citing Gibbons v. District of Columbia, 116 U.S. 404, 6 S.Ct. 427, 29 L.Ed 680 (1886).

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[3]BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

Like the New York statute at issue in Walz, the statute before us does not differentiate among religions, and it extends the exemption to various nonsectarian groups, such as charities, schools, and veterans' organizations. See TEX. PROP. TAX CODE §§ 11.11 et seq. (Vernon 1992). Thus the statute bears no resemblance to the sales tax exemption condemned in Texas monthly. Inc. v. Bullock, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), which singled out religious publications for a tax exemption. The statute's purpose is to avoid taxation on charitable organizations, including religious organizations. There is nothing improper about that legislative purpose. Nor does the statute advance religion or produce excessive governmental entanglement -- administrative or otherwise -- with religion. And the exemption has history on its side, having been part of the Texas Constitution since 1876. See TEX. CONST. art. 8, § 2 (Vernon 1955, historical note).

The district points out that the tax exemption upheld in Walz required that the religious use be exclusive, while the Texas statute requires only that the religious use be primary. Here, of course, the district seeks to tax only the church property that is used for commercial purposes, not the property used exclusively for religious purposes. The issue in this case is not whether church property is exempt from taxation, but whether that exemption is lost when the church uses the property for commercial purposes.

It is true that the exemption involved in Walz required that the property be used exclusively for religious purposes. But nothing in Walz suggested that it would violate the First Amendment to exempt religious property used primarily but not exclusively for religious purposes. The purpose and effect of the Texas exemption are the same as those of the New York statute discussed in Walz. The Texas Supreme Court has upheld the jury finding that the property at issue here is being used primarily for religious purposes. See 833 S.W.2d at 110-11. Our previous opinion upheld the finding that it is "reasonably necessary" for engaging in worship. See 800 S.W.2d at

896. We think such an exemption is sufficiently covered by the Court's reasoning in Walz even though the statute does not require that the religious use be exclusive.

The district also argues that religion is being singled out for favoritism because church property is exempt if used primarily for religious purposes, while other charitable property must be used exclusively for charitable purposes. It is true that the exemptions for charitable organizations, youth development associations, and schools extend to property used "exclusively" for the organization's purposes. See TEX. TAX. CODE §§ 11.18(a)(2), ll.l9(a)(2), 11.21(a)(2) (Vernon 1992). But each statute softens these provisions and preserves the tax exemption if the non-organizational use is "incidental." See id. §§ 11.18(b), ll.l9(b), 11.21(b). The miscellaneous exemptions in the same statute generally do not require exclusively charitable use. See Id. § 11.23. We conclude that the legislature has coordinated the religious and other charitable exemptions with reasonable equality and with an even hand, and that any difference cannot be called an establishment of religion under Walz.

The district also cites article one, § 6 of the Texas Constitution, which provides: "No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent." TEX. CONST. art. I, § 6. The district has simply cited this provision without briefing or analysis beyond its discussion of the First Amendment's establishment clause. We have rejected its First Amendment contention. It has not argued that the state constitution differs from federal law in any way. It has not analyzed the language or background of article one, § 6; nor has it cited state cases. To the extent that the district's state law contention differs from its federal contention, it has been waived by failure to brief it. See McPherson Enter. Inc. v. Producers Coo~. Marketing Ass'n, 827 S.W.2d -94, 96 (Tex. App.--Austin 1992, no writ); White v. Bath, 825 S.W.2d 227, 230 (Tex. App.--Houston [14th Dist.] 1992, writ denied); TEX. R. APP. P. 74(f).

II.

The district challenges the court's award of $125,439.18 in attorney's fees to the church. Ordinarily, attorney's fees may not be recovered in the absence of statutory authority or a contract between the parties. See Dallas Cent. Appraisal Dist. v. Seven Inv. Co., 835 S.W.2d 75, 77 (Tex. 1992); First City Bank v. Guex, 677 S.W.2d 25, 30 (Tex. 1984); Knebel v. Capital Nat'l Bank, 518 S.W.2d 795, 803-804 (Tex. 1974). In defense of the attorney's fee award, the church cites the tax code and the declaratory judgments act.

Under the tax code a taxpayer who successfully appeals an excessive appraisal or an unequal appraisal may recover reasonable attorney's fees.[4] The tax code does not expressly authorize recovery of attorney's fees to taxpayers who successfully obtain exemptions, and the church does not contend that it does. Instead, the church argues that the exemption that it sought and was granted amounted to a lowering of the appraisal from more than $2,000,000 to zero, and

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[4]During the years at issue in this suit, 1984-1986, the tax code provided as follows:

§ 42.25. Remedy for Excessive Appraisal

If the court determines that the appraised value of property according to the appraisal roll exceeds the appraised value required by law, the property owner is entitled to a reduction of the appraised value on the appraisal roll to the appraised value determined by the court.

§ 42.26. Remedy for Unequal Appraisal

The district court may not grant relief on the ground that a property is appraised unequally in comparison to the level of appraisals of other property in the appraisal district unless the appraised value of the property varies at least 10 percent from its value calculated on the basis of the weighted average level of appraisals in the district. In that event, the court shall order the appraised value changed to the value as calculated on the basis of the weighted average level of appraisals in the district.

§ 42.29. Attorney's Fees

A taxpayer who prevails in an appeal to the court under Section 42.25 or Section 42.26 of this code may be awarded reasonable attorney's fees not to exceed the greater of $5,000 or 20 percent of the total amount of taxes in dispute.

TEX. PROP. TAX CODE §§ 42.25, 42.26, 42.29 (Vernon 1992 and explanatory notes). Later amendments to §§ 42.26 and 42.29 do not affect this appeal.

therefore it can recover attorney's fees because it challenged an excessive appraisal. In this regard, the judgment did not stop at declaring the property exempt from taxation. The court went further and "found" that "the appraised value of the property, according to the appraisal roll, exceeds the appraised value required by law, and that the First Baptist Church is entitled to a reduction of the appraised value on the appraisal roll to zero for each of the tax years in question (1984, 1985, 1986)" (emphasis added). We reject this basis for recovering attorney's fees.

The statute plainly confines attorney's fees awards to cases of excessive or unequal appraisals, and not exemptions. It is true that the church asked for and the court granted both the exemption and a declaration that the appraised value was zero. The court even ordered the district "to correct the appraisal roll to reflect that the market value of the properties" is zero, even though the parties had stipulated that if the exemption were denied the market value exceeded $2,000,000. But that does not bring the case within sections 42.25 and 42.26. It would require pure sophistry for us to hold that this was a suit about valuation and appraisal instead of exemption. We agree with the court in Coastal States Crude Gathering Co. v. State Property Tax Board, 747 S.W.2d 61, 63 n.1 (Tex. App.--Austin 1988, no writ), that "this lawsuit dealt with the question of whether the property should be appraised and taxed at all, not the value of the appraisal." In an analogous context, the courts have held that a suit to establish an open-space land designation is not a suit to contest excessive or unequal appraisal, and therefore attorney's fees are not recoverable. See Dallas Cent. Appraisal Dist. v. Seven Inv. Co., 835 S.W.2d 75, 79 (Tex. 1992); Kerr Central Appraisal Dist. v. Stacy, 775 S.W.2d 739, 743 (Tex. App.--San Antonio 1989, writ denied). We hold that because the suit was in reality to establish an exemption and not to rectify an unequal or excessive appraisal, the tax code does not support the award of attorney's fees.

The church also argues that it sought and received a declaratory judgment and that the declaratory judgment act supports the attorney's fees award. Section 37.009 of the act provides, "In any proceeding under this chapter [declaratory judgments], the court may award costs and reasonable and necessary attorney's fees as are equitable and just." See TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1986). But a litigant may not seek a declaratory judgment in an existing suit simply to recover attorney's fees that are otherwise not authorized by statute. City of Laredo v. South Texas Nat'l Bank, 775 S.W.2d 729, 732 (Tex. App.--San Antonio 1989, writ denied); Heritage Life Ins. Co. v. Heritage Group Holding Corp., 751 S.W.2d 229, 235-36 (Tex. App.--Dallas 1988, writ denied). "The Declaratory Judgments Act is 'not available to settle disputes already pending before a court.'" BHP Petroleum Co. v. Millard, 800 S.W.2d 838, 841 (Tex. 1990), quoting Heritage Life, 751 S.W.2d at 235.

This rule is essential as long as the legislature chooses to authorize attorney's fees in some situations and to deny them in others. If the law were otherwise, litigants could routinely create a right to attorney's fees by seeking a declaration that they are entitled to relief on claims for which attorney's fees are not recoverable. In tort suits, for example, litigants could seek a declaration of liability -- or nonliability -- and thereby recover attorney's fees. See Weaver v. Aids Servs. Inc., 835 S.W.2d 798, 803 (Tex. App.--Austin 1992, writ denied). In an analogous situation, the court has held that a potential tort defendant may not use the declaratory judgment act to seek a declaration of nonliability and thereby choose favorable venue. See Abor v. Black, 695 S.W.2d 564 (Tex. 1985). The declaratory judgment act does not support the award of attorney's fees.

For the reasons stated, we sustain the district's point one and reform the judgment to delete the award of attorney's fees.

III.

The district next complains about various trial rulings admitting evidence and about the church's jury argument.

The court allowed the church to question a witness for the district about exemptions the district had granted to the City of San Antonio and to other nonchurch taxpayers. Clearly, this evidence was not relevant to the main issue in the case -- whether the church met the standards of § 11.20(a)(1) of the tax code.[5] The church either met the statutory requirements for exemption or it did not, and whether the city had granted an exemption to other taxpayers had nothing to do with whether the church qualified under the statute. For this reason, the church pleaded that the district had violated the federal and state equal protection provisions by appraising its property "unequally and un-uniformly in comparison with other similar properties." The church argues that the evidence about other exemptions was relevant to its claim of unequal treatment.

The church did not present evidence to raise an issue on this cause of action, and did not even request that it be submitted. Nevertheless, the court did not err in allowing the church to question the district's head appraiser about these other exemptions. The matter was pleaded, and the district had not removed it from the case by summary judgment.

"The government does not lose its right to taxes justly owing on one parcel of property, by reason of the failure of its officers, either negligently or designedly, to assess other property that is likewise taxable." City of Arlington v. Cannon, 153 Tex. 566, 271 S.W.2d 414, 416 (1954), quoting City of Wichita Falls v. J.J. & M. Taxman

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[5]Section 11.20 of the property tax code provides in pertinent part as follows:

(a) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of:

> (1) the real property that [1] is owned by the religious organization, [2] is used primarily as a place of regular religious worship, and [3] is reasonably necessary for engaging in religious worship. . . .

TEX. PROP. TAX CODE §11-20 (Vernon 1982) (emphasis added).

Refining Co., 74 S.W.2d 524, 530 (Tex. App.--Fort Worth 1934, writ ref'd). The court said essentially the same thing in these words:

> If a valuation fixed by a board of equalization is attacked on the ground of unlawful or arbitrary discrimination it is not sufficient to show, comparatively, that in other isolated instances, property of equal or greater value than that in suit was valued at less . . . or even that other property was omitted from the tax rolls altogether...except where the omission was the result of a deliberate and arbitrary plan or scheme to permit certain classes of property to escape their fair share of the tax burden.

State v. Whittenburg, 153 Tex. 205, 265 S.W.2d 569, 573 (1954) (citations omitted). There is no suggestion here that the district omitted property from the tax rolls pursuant to a scheme to permit classes of property to escape taxation, which Whittenburg requires.

Nevertheless, given the state of the pleadings, which included the count for denial of equal protection, we cannot say that the court erred in admitting the evidence.

Over the district's objection, the court also allowed the church to elicit from a Valero witness testimony about several of Valero's charitable works.[6] The witness described Valero's involvement raising money for the United Way, the American Cancer Society, the Salvation Army, the American Heart Association, and "various universities." The witness also told of Valero's yearly Christmas party given for children from an orphanage. He added, "Any charity here in town that's established, we've got some participation, either volunteer time or money." Similarly the church was permitted to list such charitable works as its counseling ministry, a soup kitchen, a dental

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[6]Under the 1980 lease agreement, Valero is responsible for the upkeep and maintenance of the lots and for the payment of all property taxes over and above the 1979 tax rate. In 1984-1986 it paid the church rental of $111,925 per year for use of the parking spaces.

clinic, and a refugee ministry for boat people and others who fled Southeast Asia after the Vietnam War.

No one contends that Valero's character was an issue in the case, or that its good or bad character was relevant to any issue before the jury. The jury was asked only whether the church's parking lot met the statutory qualifications for the tax exemption. The church argues that it is "just good lawyering" to humanize and personalize a corporate entity. We will go even further and say that good lawyers everywhere would be eager to prove up their clients' good deeds and the evil deeds of their opponents, if the rules permitted it. Under such a system, trials would turn into contests about which party has the better charitable record. There might be no end to the evidence litigants would present about themselves and their opponents. But in civil cases the rules strictly limit the admissibility of evidence of good or bad character. See TEX. R. CIV. EVID. 404-405; see generally 33 STEVEN GOODE, ET AL., GUIDE TO TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL. §§ 401.1-405.3 (Texas Practice 1988 & Supp. 1991). The evidence was not admissible on grounds that it was relevant to a jury issue.

The church argues the district had opened the door during its opening statement by mentioning that several Valero executives were attending the trial and that it and the church were represented by two lawyers. (Counsel for the district had also established that Valero was in business for profit and was not a charitable or nonprofit entity, which was proper in this case involving the statutory exemption for religious and charitable activities.) Beyond any doubt, it has become increasingly common for attorneys to use prejudice as a weapon in the modern-day lawsuit. Trial judges should use their authority under evidence rules 401-403 to exclude evidence with weak probative value concerning the jury issues and strong prejudicial impact. Here the district's alleged door-opening remark -- a mere reference to the presence of corporate executives in the courtroom -- seems tame in comparison to prejudicial remarks employed in other kinds of

litigation. A similar argument was recently used against a church in Macedonia Baptist Church v. Gibson, 833 S.W.2d 557, 561-62 (Tex. App. -Texarkana 1992, writ denied). Nevertheless, we think it was within the court's broad discretion to admit the evidence.

The district also challenges the court's admission of evidence that a Baptist church in downtown Houston had moved to the suburbs because it had no parking space downtown. That evidence was relevant to the issue of whether a parking lot was "reasonably necessary for engaging in worship," which 11.20 of the statute required the church to prove and which the court submitted in its charge. The court properly admitted the evidence.

The District also complains about portions of the church's jury argument. The church's lawyers had agreed to the district's motion in limine, which asked that counsel not comment on its failure to call witnesses without first approaching the bench for a ruling. Nevertheless, lead counsel for the church asked a witness for the district whether certain employees were still employed, still living in town, and whether they would "be here today to testify." Counsel for the district objected. The court sustained the objection and said, "Go into some other line of questioning. You may not argue that."

In final argument the church's attorney asked the jury, "Now, where are the people with the firsthand knowledge who could have come down here and talked? You haven't heard anybody from the Appraisal District with firsthand knowledge." The court sustained the district's objection.

This argument was a clear violation of the in-limine ruling. Counsel argues in this court that he thought the court had simply prohibited mention of witnesses equally available to both parties. But the in-limine ruling plainly forbade comment on the District's failure to call "any" witnesses, and any doubt about the reach of that ruling had been eliminated earlier during trial when the court sustained the district's objection to the church's questions about whether certain

district employees were still in town and whether they would "be here to testify."

Even without the in-limine ruling, the argument was questionable. In certain circumstances the trial court may allow counsel to comment on the opposite party's unexplained failure to call a witness. The witness (1) must be under the opponent's control or must stand in some special relationship to the opponent, and (2) must have been in a position to obtain material information unfavorable to the opponent about an issue in the case. In addition, (3) the record must show that the witness is legally available. See Tex-Jersy Oil Corp. v. Beck, 157 Tex. 541, 305 S.W.2d 162, 167 (1957), overruled on other grounds, Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983); First Interstate Bank v. Bland, 810 S.W.2d 277, 289 (Tex. App.--Fort Worth 1991, no writ); Johnson v. Smith, 446 S.W.2d 357, 359 (Tex. Civ. App.--San Antonio 1969 writ ref'd n.r.e.); 4 MCDONALD, TEXAS CIVIL PRACTICE § 23:12 (1992).

Comment on the failure to call a witness is appropriate only when it is clear that the uncalled witness may have adverse knowledge about a material disputed fact. In Tex-Jersey, for example, the company did not call an eyewitness to an accident scene. In Gulf, Colorado & Santa Fe Railroad v. Parmer, 389 S.W.2d 558, 564 (Tex. Civ. App.--Beaumont 1965, writ ref'd n.r.e.), the railroad did not call an employee, present in the courtroom, who might have tampered with the accident scene before a photographer took pictures. In several cases there was comment about a litigant's failure to call a doctor who had pertinent information. See MCDONALD, supra, 23:12, at note 90.

Counsel may not comment on the adverse party's failure to call a witness unless the witness has information material to the issues before the jury. Trial courts therefore should not allow counsel to comment on the failure of a company to call employees who may know something about peripheral issues in the case. Otherwise lawyers would be penalized for concentrating on the heart of a case

and not presenting marginal or cumulative evidence. Surely our legal system should not permit one advocate to implicitly criticize the other in final argument for getting to the crux of a case instead of presenting testimony about each and every minute matter that might have some relevance to the issues. Under our rules many bits of evidence, coming from many potential witnesses, might be considered relevant -- that is, having a tendency to make the existence of any material fact more probable or less probable than it would be without the evidence. See TEX. R. CIV. EVID. 401. Trials last long enough already, and the law should not motivate advocates to call extra witnesses for fear of being criticized in jury argument for not presenting every possible witness under their control.

The argument before us appears to criticize the district for failing to present witnesses on peripheral issues, something the court certainly had the discretion to forbid. By granting the district's motion in limine and sustaining its objections during trial, the court had forbidden the mention of the failure to call witnesses. The central question in the trial was whether the church qualified under the statutory definition for the exemption; there is no indication that the district's employees withheld or had access to any pertinent information. And counsel's argument seems especially unnecessary because the information bearing upon the exemption rested with the church and Valero, not with the district, and because the rules make it so easy to depose or subpoena adverse witnesses. The witnesses may have had information relevant to the church's claim that it had received unequal treatment in comparison to other similar property, but that claim was not submitted to the jury.

Nevertheless we cannot reverse the judgment unless the record shows that the argument was reasonably calculated to cause and probably did cause rendition of an improper judgment. See TEX. R. APP. P. 81(b)(1). No reversible error is shown.

The district makes an additional complaint about the church's jury argument, which dealt with how the church spent the tax savings.

It also complains of two instances in which the court sustained objections to his attempted cross-examination of Valero witnesses, the admission of a misleading photograph, and a ruling during voir dire. Having considered the whole record, we hold that in each of these instances even if the court's rulings were erroneous they were not reversibly harmful under TEX. R. APP. P. 81(b)(1).

IV.

We reject the church's request that we assess damages under TEX. R. APP. P. 84 for frivolous assertion of its constitutional arguments. Though we have overruled the district's constitutional challenge to this tax exemption, the challenge was certainly not frivolous. The district did not delay this appeal by adding constitutional arguments to its other plausible contentions; one of them we have sustained, and others presented error, though we have found the error harmless.

* * * * *

We have considered all the district's complaints about the judgment. With the exception of the award of attorney's fees, all are overruled.

We reform the judgment to delete the award of attorney's fees. As reformed, the judgment is affirmed.

DAVID PEEPLES

Justice

PUBLISH

Court of Appeals

Fourth Court of Appeals District of Texas

San Antonio

JUDGMENT

Appeal No. 04-89-00543-CV

BEXAR COUNTY APPRAISAL REVIEW BOARD, et. al.,

Appellant

v.

FIRST BAPTIST CHURCH, et. al.,

Appellee

Appeal from the 224th District Court of

Bexar County

Trial Court No. 84-CI-20348

Honorable Carolyn H. Spears, Judge Presiding

BEFORE CHIEF JUSTICE REEVES AND

JUSTICES BUTTS AND PEEPLES

JUDGMENT

In accordance with this Court's opinion of this date, the motion for rehearing is DENIED.

We reform the judgment to delete the award of attorney's fees. As REFORMED, the judgment is AFFIRMED.

/S/

DAVID PEEPLES

JUSTICE

SIGNED January 20, 1993.

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio
OPINION
Appeal No. 04-89-00543-CV
BEXAR COUNTY APPRAISAL REVIEW BOARD, et. al.,
Appellant
v.
FIRST BAPTIST CHURCH, et. al.,
Appellee
Appeal from the 224th District Court
of Bexar County
Trial Court No. 84-CI-20348
Honorable Carolyn H. Spears, Judge Presiding
Opinion by: David Peeples, Justice
Sitting: Shirley W. Butts, Justice
Blair Reeves, Justice
David Peeples, Justice
Delivered and Filed: October 10, 1990
REVERSED AND RENDERED.

Appellants Bexar County Appraisal Review Board and the Bexar Appraisal District (collectively referred to as BCARB) appeal from a judgment based on a jury finding that two parking lots owned by the First Baptist Church of San Antonio (the church) and leased to the Valero Realty Company (Valero) are exempt from property taxes for 1984-1986. The judgment ordered that the value of the property on the appraisal roll be reduced to zero, and decreed that the property is exempt from taxation for the three years. The judgment also awarded the church attorney fees. We reverse and render judgment that the property is not exempt from taxation.

The church is located in downtown San Antonio, across the street from Valero Realty Company, a subsidiary of Valero Energy Corporation. The church has been in its present location since

approximately 1905; it acquired the disputed parcels of land piecemeal over a twenty-year period, beginning in 1957. On the subject property are two parking lots near Valero, which are owned by the church but leased to Valero for its use on weekdays from 7:30 A.M. to 5:00 P.M. The lease agreement, signed in 1980, provides that Valero is responsible for the upkeep and maintenance of the lots, and for the payment of all property taxes over and above the 1979 tax rate. The lease permits Valero to park on 407 of 447 spaces during the stated weekday working hours, but reserves to the church the use of the lots at all other times. In 1984-1986 Valero paid the church a rental of more than $111,000 per year.[7]

The church sought an exemption on these lots in 1984, which was denied. It exhausted its administrative remedies and then filed suit for the tax year 1984. The church filed again for an exemption in 1985, which was granted and then automatically renewed in 1986. In October 1986, BCARB reversed its decision and denied the 1985 and 1986 exemptions that had been granted. The church again exhausted its administrative remedies and filed suit for the tax years 1985 and 1986. Valero was joined as a party over BCARB's objection, and the two suits were consolidated, the church and Valero seeking to reverse the denial of the exemption. The parties stipulated that the market value of the property, if the exemption were denied, exceeded two million dollars. The jury found that the property was entitled to the exemption, and the court rendered judgment on the verdict.

BCARB presents five points of error, complaining that (1) the award of attorney's fees was unauthorized, (2) the court made certain erroneous rulings during trial, (3) the evidence is legally and factually insufficient, (4) the judgment is unconstitutional, and (5) the court erred in its submission of jury question one and its accompanying instructions. In one cross-point, the church and Valero seek damages

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[7]During the three years in question, the church received a yearly rental of $111,925, calculated at $275 per space per year for 407 spaces.

on the ground that the claim of unconstitutionality is frivolous and was brought for purposes of delay. Because the record does not contain legally sufficient evidence that the parking lots were used primarily for a religious purpose, we reverse and render judgment that they are not exempt from taxation for 1984-1986.

BCARB challenges the legal sufficiency of the evidence to support the jury's finding that the church was entitled to the exemption. In particular, BCARB says that there is no evidence that the property is used primarily for religious purposes, as the law requires and as the jury impliedly found.

Section 11.20 of the property tax code provides in pertinent part as follows:

> (a) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of:
>
> > (1) the real property that [1] is owned by the religious organization, [2] is used primarily as a place of regular religious worship, and [3] is reasonably necessary for engaging in religious worship. . . .

TEX. PROP. TAX CODE §11.20 (Vernon 1982) (emphasis added). The statute further provides that if property otherwise satisfies §11.20(a), its use "for occasional secular purposes other than religious worship does not result in loss of the exemption if [1] the primary use of the Property is for religious worship and [2] all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship." Id. 11.20(d) (emphasis added).

The supreme court recently construed these provisions in a parking lot case somewhat similar to our own. In City of Austin v.

University Christian Church, 768 S.W.2d 718 (Tex. 1988), the court interpreted the statute in the context of a church's rental of land to a commercial parking lot company, while retaining use of the lots on Sundays and at other times. Concerning the statute at issue in the present case, the court held that "place of religious worship" is not limited to the sanctuary:

> For purposes of the tax exemption, a place of religious worship includes not only the sanctuary, but also those grounds and structures surrounding the sanctuary which are necessary for the use and enjoyment of the church.

Id. at 719. "Under this definition," continued the court, "a parking lot may qualify as a place of religious worship." Id. at 719-20. But in order for the parking lot to be tax exempt, its use must be "primarily religious" within 11.20(a)(1):

> Whether a parking lot used in connection with regular religious worship is tax exempt, however, depends on (1) whether the religious organization owns the property, (2) whether the property's use is Primarily religious, and (3) whether the property's use is reasonably necessary to the religious worship.

Id. at 720 (emphasis added). The remainder of the court's opinion stresses the statute's requirement of primary use. Rejecting the efforts of both parties to have it decide the issue as a matter of law, the court said that "the property's primary use is, and remains, an issue of fact for the jury." Id.[2] In the present case the trial court submitted the

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[2]On remand the court of appeals held that the evidence was factually sufficient to support the jury finding that the property was not exempt. 789 S.W.2d 361 (Tex. App.--Austin 1990, no writ).

exemption question with instructions that stated the law set forth in 11.20(a) and University Christian Church.[3]

Under these authorities, the church had the burden of producing evidence that the use of the parking lots was primarily religious, and our question is whether the record contains such evidence. While the court in University Christian Church said that primary use is a jury question, there must of course be legally sufficient evidence of primary religious use before the matter becomes a jury question because the legislature did not authorize courts or juries to grant exemptions without legally sufficient proof of the statutory requirements.

Bearing in mind the standard of review for no-evidence points of error, we consider the evidence in the light most favorable to the verdict. See Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965). The evidence of primary use is simple and uncontested. Valero has the right to park in 407 of 447 spaces from 7:30 A.M. to 5:00 P.M. Monday through Friday each week. Church members can use the

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[3]Jury question number one read as follows:

Find, from a preponderance of the evidence, whether the First Baptist Church of San Antonio is entitled to an exemption on the property the subject of this lawsuit.

we the Jury answer:

The property should be exempt: [Yes]

The property should not be exempt: _____

You are instructed that in order to qualify for an exemption that the property must be owned by a religious organization; be used primarily as a place of regular religious worship; and, be reasonably necessary for engaging in religious worship. You are further instructed that the use of the property for occasional secular purposes other than religious worship does not result in loss of the exemption if the primary use of the property is for religious worship, and all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship.

"Religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage and commitment in behalf of a religious faith.

You are further instructed that in considering whether the property the subject of this suit should be exempt, that a place of religious worship includes not only the sanctuary, but also those grounds and structures surrounding the sanctuary which are necessary for the use and enjoyment of the Church.

other forty spaces at any time, and the entire lot is available to them on Saturdays and Sundays and from 5:00 P.M. to 7:30 A.M. during the week. Clearly the lot is available for church access during a majority of the hours of each week.[4] The only evidence in our record relating to the church's actual use of the parking lots was that the lots were used by church members on Sundays in order to attend religious services and on Wednesday evenings to attend a prayer meeting; there was "some" use of the lots for special events and on Saturdays; the lots were rarely used by church members after 7:00 in the evening; and the lots were not used by the church at all after 10:00 in the evening. One church member specifically testified that he could not recall any other religious use of the property (such as for revivals or choir practice) since 1980.

In response to BCARB's argument that Valero uses the lots much more than the church does, the church states that the inquiry is more than a mathematical calculation of the number of hours that it and Valero use the lot. It then notes that if calculation of hours is the issue, it had "total use" of the property a majority of the time. The church also says that the primary use of the property, from its point of view, is as a place for its congregation to park, as a buffer against encroachment, and as assurance of adequate room for growth. A secondary use, it says, is "to generate income." The church points to

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[4]The following exchange between counsel for BCARB and a church witness exemplifies the testimony on the issue of primary use (emphasis added):

Q. [Valero is] using the church property. And really, we can say that each and every day of the week we've got nine-and-one-half hours that Valero is using this property, which are the parking lots, Monday through Friday. Now, you agree with that?

A. Yes, sir.

Q. And then, how much time out of the Monday through Friday would you assign to church use between, let's say, 5:00 p.m. through the rest of the evening, with the exception of the 40 spaces, which I understand are always reserved for the church?

A. Well, the balance of the day is for church use.

Q. Yes, sir. And are they actually used by the church members?

A. They are available for use.

no other evidence of primary religious use, and we have found none. The question therefore is whether (1) access to the lots for a majority of the week, plus (2) the fact that the actual use by the church is for religious purposes constitutes some evidence that the property is used primarily for religious purposes.

We hold that this evidence is legally insufficient because under the statute and University Christian Church the inquiry is the actual use of the property, not the church's primary reason for owning it or the amount of theoretical access the church enjoys. When the overall, day-to-day use of the property is considered, it is clear that the property is used almost entirely by Valero. The church does not contend that its right to access from 5:00 P.M. through the night until 7:30 A.M. constitutes evidence of primary religious use. The fact that Valero leaves the lots empty for fourteen and one-half hours each night and gives the congregation the right to enter at night and on weekends does not mean that the lots are being used primarily for a religious purpose. Nor is primary religious use proved by evidence that from the church's viewpoint the lots are kept because it is necessary for a downtown church to have parking. Evidence that the church acquired the land and retains it for member parking and for future growth does not constitute evidence that it is used primarily for religious purposes. Whether ownership of the parking lots is necessary for this downtown church pertains to element three under 11.20(a), and nothing in this opinion is meant to cast doubt on the jury's implied finding on this element. But element three has no bearing on the second element at issue in this appeal -- primary use.

We stress that the issue before us is not whether the church is entitled to own property for parking and future growth, or whether it can lease its property on these or any other terms. We have not sustained BCARB's factual sufficiency challenge to the jury's implied finding that the parking lots were reasonably necessary for engaging in religious worship. No one questions that the church is entitled to own and lease property. The sole issue before this court is whether

such property remains tax exempt when there is no proof that it is used primarily for religious purposes. A church must make such proof in order to establish a tax exemption under § 11.20. we hold that the record contains no evidence that the two parking lots are used primarily for religious purposes, as the statute requires, and that accordingly the judgment granting, the exemption cannot stand.

The judgment ordering the tax exemption is reversed, and judgment is rendered that the lots in question are not exempt from taxation.

DAVID PEEPLES
Justice

PUBLISH

IN THE SUPREME COURT OF TEXAS

NO. D-0689

FIRST BAPTIST CHURCH OF SAN ANTONIO ET AL.,
PETITIONER

v.

BEXAR COUNTY APPRAISAL REVIEW BOARD ET AL.,
RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE
FOURTH DISTRICT OF TEXAS

Opinion

In this property tax exemption case, we consider whether there is some evidence to support a jury finding that two parking lots owned by First Baptist Church of San Antonio and leased to Valero Realty Company qualified for a property tax exemption. The trial court rendered judgment that the parking lots were exempt from property taxes. The court of appeals reversed and rendered, holding that the parking lots were not tax exempt because there was no evidence that the parking lots were primarily used for religious purposes. 800 S.W.2d 892. We reverse and remand its cause to the court of appeals for further proceedings.

First Baptist Church of San Antonio ("the church") is located in downtown San Antonio, across the street from Valero Realty Company ("Valero"). The church owns two parking lots which it leased to Valero pursuant to a ten year agreement signed in 1980. The lease permitted Valero employees and visitors to use 407 of the 447 spaces from 7:30 a.m. to 5:00 p.m. Monday through Friday, but reserved use of the parking lots to the church at all other times. Valero paid a monthly fee to the church[1] and was responsible for maintenance

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[1]Valero paid the church $111,925 per year from 1984 through 1986. This was calculated at $275 per parking space per year for 407 spaces.

and upkeep of the parking lots, and for payment of all property taxes above the amount set in 1979.

The church sought exemptions on these parking lots in 1984, 1985 and 1986. After the exemptions were denied, the church exhausted its administrative remedies and filed suits against the Bexar County Appraisal District and Review Board for the tax years 1984, 1985 and 1986. Valero filed a plea in intervention and the suits were consolidated for trial.

The jury found that the parking lots were tax-exempt,[2] and the trial court rendered judgment on the verdict. The court of appeals reversed and rendered, holding that there was no evidence that the parking lots were primarily used for religious purposes to justify a tax exemption.

I.

Section 11.20 of the Texas Tax Code establishes the criteria for determining if a religious organization qualifies for a tax exemption. Section 11.20(a)(1) provides that a religious organization is entitled to an exemption from taxation of "the real property that is owned by the religious organization, is used primarily as a place of regular religious worship, and is reasonably necessary for engaging in religious worship...." Tex. Tax Code Ann. § 11.20(a)(1). Section 11.20(d) provides that if property satisfies the requirements of section 11.20(a)(1), its use "for occasional secular purposes other than religious worship does not result in loss of the exemption if the primary use of the property is for religious worship and all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship." Tex. Tax

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[2]In accordance with broad-form submission practice, the trial court properly submitted the issue to the jury as a broad question which asked whether the church was entitled to a tax exemption on the parking lots. The broad-form question was accompanied by instructions stating, among other things, the statutory requirements of section 11.20(a)(1) of the Texas Tax Code that had to be met in order for the church to qualify for an exemption. In finding that the church was entitled to an exemption, the jury implicitly found that the church met the statutory requirements of section 11.20(a)(1).

Code § 11.20(d). "For purposes of the tax exemption, a place of religious worship includes not only the sanctuary, but also those grounds and structures surrounding the sanctuary which are necessary for the use and enjoyment of the church." City of Austin v. University Christian Church, 768 S.W.2d 718, 719 (Tex. 1988).[3] Thus, a parking lot may qualify as a place of religious worship. Id. at 719-20. But whether a church parking lot is exempt depends on whether the requirements of section 11.20(a)(1) are met. Although Bexar County Appraisal District and Review Board raised other points of error, the court of appeals held that there was no evidence that the parking lots were primarily used for religious purposes, and reversed and rendered judgment against the church. Consequently, the only issue before this Court is the primary use of the parking lots.

II.

The church argues that there is evidence that the parking lots were used primarily for religious purposes. After a review of the record, we agree.

In determining whether there is any evidence to support a jury finding, we consider only the evidence and inferences tending to

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[3]In University Christian Church, the church owned two parking lots which it leased to Allright Parking. University Christian Church, 768 S.W.2d at 719. Under the terms of the lease, the church retained exclusive use of the parking lots on Sundays and was allowed to use the lots on various other occasions. Id. The Church received a monthly fee from Allright Parking, as well as a percentage of Allright Parking's gross receipts from its use of the parking lots. Id. The City of Austin and other taxing authorities sued the church to collect delinquent ad valorem taxes levied on the parking lots. The trial court rendered judgment for the taxing authorities based on the jury's failure to find that the property was primarily used for religious worship. Id. at 718. The court of appeals reversed and rendered judgment for the church, holding that the evidence conclusively established the property was primarily for religious worship. 724 S.W.2d 94. This Court held that the court of appeals erred in concluding, as a matter of law, that the church's parking lots were primarily used for religious worship, and remanded the case to the court of appeals to consider the factual sufficiency of the evidence. University Christian Church, 768 S.W.2d at 720-21. On remand, the court of appeals held that the jury's failure to find that the parking lots were used primarily for religious worship was not so against the great weight and preponderance of the evidence as to be manifestly unjust. University Christian Church v. City of Austin, 789 S.W.2d 361, 366 (Tex. App. - Austin 1990, no writ).

support the jury finding and disregard all evidence to the contrary. Lucas v. Texas Industries, Inc., 696 S.W.2d 372, 377 (Tex. 1984); see Murphy v. Hammons, 509 S.W.2d 845, 846 (Tex. 1974). If there is any evidence of probative value to support the jury's finding that the parking lots were primarily used for religious purposes, the jury's finding must be upheld. Lucas, 696 S.W.2d at 377.

In ascertaining whether there is any evidence that the parking lots were primarily used for religious purposes, we look beyond a mere mathematical calculation of the number of hours the church and its members physically occupied the parking lots versus the number of hours Valero physically occupied the parking lots. While the "actual use" of the property is an important factor in determining primary use, it is not the sole consideration. Instead, the use of the church property must be examined qualitatively as well as quantitatively. Thus, the primary use of church parking lots may not be determined by simply adding up the number of hours that church members actually park their cars on the lots.

At trial, the jury heard testimony that the property on which the two parking lots are located was purchased by the church to ensure adequate parking for church members attending church activities. In fact, several witnesses indicated that the church's primary use of the two parking lots was to provide church members with access to church facilities. The church reserved forty parking spaces for the exclusive use of its members, and reserved the remaining spaces for church use at all times except weekdays from 7:30 a.m. to 5:00 p.m. The church also had the right to use the parking lots on holidays observed by Valero. The parking lots were regularly used by church members on Sundays and Wednesday evenings, and sometimes used by church members on Saturdays and for special events throughout the week. Therefore, we hold that there is some evidence to support the jury's finding that the parking lots were used primarily for religious purposes.

The Bexar County Appraisal District and Review Board advanced several other points of error in the court of appeals but that court did not consider them because of its erroneous conclusion that the record contained no evidence that the parking lots were used primarily for religious purposes. We have the option of either examining the points of error not considered by the court of appeals in order to determine if any of those points will support the court of appeals' judgment or remanding the cause to the court of appeals for it to pass on the unconsidered points. See Coulson v. Lake LBJ Municipal Utility District, 734 S.W.2d 649, 652 (Tex. 1987). Because the unaddressed points of error include attacks on the sufficiency of the evidence, we believe judicial economy is best served by remanding the entire cause to the court of appeals for consideration of all previously unaddressed points.[4] Id.

Accordingly, we reverse and remand the cause to the court of appeals.

/S/
JACK HIGHTOWER
JUSTICE

OPINION DELIVERED: June 10, 1992
Concurring Opinion by Justice Cook. Dissenting Opinion by Justice Mauzy joined by Justices Doggett and Gammage.

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[4]The previously unaddressed points include whether the church was entitled to attorney's fees, whether the trial court's rulings denied BCAD a fair trial, whether there was legally or factually insufficient evidence to support the jury's finding on issues other than the primary use of the property, whether there was factually insufficient evidence to support the jury's finding on the primary use issue, whether the trial court's judgment violates certain provisions of the United States Constitution or the Texas Constitution, whether the trial court erred in submitting the question and instructions concerning the church's right to an exemption, and the church's cross-point concerning delay damages.

IN THE SUPREME COURT OF TEXAS

No. D-0689

FIRST BAPTIST CHURCH OF SAN ANTONIO, ET AL.,
PETITIONERS

v.

BEXAR COUNTY APPRAISAL REVIEW BOARD, ET AL.,
RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE
FOURTH DISTRICT OF TEXAS

CONCURRING OPINION

Today the court adopts a reasonable and practical approach to the problem of determining primary use of a place of religious worship. It is a fair approach, one which does not stretch the exemption beyond the constitutional limit or beyond the intent of the legislature. It is an approach which offers appraisal districts common sense guidance to the task of applying the concept of "primary use." And it does not, as the dissent would do, confine the exemption so narrowly as to eradicate it altogether.

Many states have grappled with the definition of "use" in statutes similar to ours. Most of these states apply a rule of strict construction to their exemption statutes. See, e.g., Church Divinity School v. Alameda County, 152 Cal. App. 2d 496, 314 P.2d 209, 211-12 (Cal. Ct. App. 1957). Entities claiming the exemption must show that they clearly come within the terms of the exemption. Id. at 212. Yet, even in the states which grant exemptions based only upon "exclusive use," the courts have recognized that a relentlessly narrow interpretation of the term "exclusive use" would destroy the exemption. Consequently, these states have adopted a statutory interpretation based upon reasonableness. See, e.g., id. at 212-214 (construction of statute must be reasonable one with due regard for ordinary meaning of language employed and object sought to be accomplished); Lutherans Outdoors in South Dakota, Inc. v. South

Dakota Bd. of Equalization, 475 N.W.2d 140, 143 (S.D. 1992) (Whether property is used exclusively for religious purposes is to be construed reasonably).

The constitution and the statutes of our own state "evince a liberality in the exemption from taxation of property for educational or religious purposes." Harris v. City of Fort Worth, 142 Tex. 600, 180 S.W.2d 131 (1944). This liberality is particularly evident in the current statute granting a tax exemption for real property used primarily as a place of regular religious worship, as long as it is reasonably necessary for engaging in religious worship. TEX. TAX CODE ANN. § 11.20(a)(1)(Vernon Supp. 1992). Section 11.20(a)(1) grants the exemption based on *primary use*, not *exclusive use*. That the legislature chose the word "primarily" intentionally and carefully is made clear by comparison to section 11.20(a)(3), which grants an exemption based on *exclusive use* to real property used as a church residence. Id. at § 11.20(a)(3).

Notwithstanding our state's consistent historical support of tax exemptions for religious organizations, the dissent displays a hostile attitude toward the tax exemption at issue in this case. The dissent's unforgivingly narrow construction of the word "use," demands that "use" of a parking space can mean only that the space be actually occupied for religious purposes. Such a construction would surely result in loss of an exemption for almost every church facility in the state. For no church actually occupies its real property twenty-four hours a day, either for strictly religious or any other purpose. Every church sanctuary, every adjoining church building, and every church parking lot are vacant many hours during the week.

Are we really to say that these facilities should lose their exemptions because they are not actually used for religious purposes most of the hours of the day? Are we really to demand that church parking spaces be actually occupied for religious purposes most of the time. That kind of thinking would demand that the church in this case either pay taxes or resort to extraordinary measures to insure that each

parking space be not only reserved, but actually used for church purposes only. I have an image of the church fencing the lot to prevent unauthorized use by the work force of a congested downtown area. And I can see tax appraisers standing over a set of parking spaces, calculating the number of hours each space is occupied for religious purposes, commercial purposes, or not used at all. Surely we must reject any statutory interpretation which logically concludes in such impractical demands.

I believe it far more sensible to follow the approach of our court in today's opinion. In it, we echo the logic and the sentiments of the Florida Supreme Court in a case remarkably similar to the one we now face. Central Baptist Church of Miami Florida, Inc. v. Dade County, 216 So.2d 4 (Fla. 1968). In Central Baptist Church, the court explained that the church owned an entire city block in downtown Miami. A large part of the church facility was devoted to parking. Some parking spaces were reserved at all times for church personnel, and all parking dedicated for use by church members during the evenings and on Sundays. During weekday business hours, the rest of the parking area was rented out as a commercial parking lot. The net income from the lot was devoted by the church to its world missions and its education program.

The controlling Florida statute in Central Baptist Church was consistent with the State constitution in providing for tax exemptions for "houses of public worship." Id. at 5. The statute expressly prohibited exemptions for "any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship.... " Id. at 5-6. These facilities, continued the statute, "shall be taxed the same as any other property." Id. at 6. The court focused on use in interpreting the statute, deciding that it granted a general statutory exemption of property "used for church or religious purposes." Id.

In deciding how the statute should affect the peculiar problem of the downtown church, the court asked what the legislature tried to

do when drafting the statute. The court focused on the limited nature of the rental and on the fact that the portion of the lot rented did not place that portion beyond the regular and customary church use. Id. The court distinguished between the situation presented by the case and hypothetical situation where church property might be held by private persons for speculative purposes or rented for a nonworship or nonschool purpose. These situations would represent significant diversions from church use and would justify loss of the exemption. "However," stated the court, "lesser and more limited divergent uses of church property are apparently not deemed by the Legislature sufficiently inconsistent with church purposes to lift the exemption, provided the funds derived from such uses are not diverted to purposes not contemplated by [the constitution]." Id. The court added:

> [T]he limited part time rental of a portion of the church lot for commercial parking on weekday business hours is reasonably incidental to the primary use of the church property as a whole for church or religious purposes and is not a sufficiently divergent commercial use that eliminate the exemption as to the commercial parking lot portion of the property. Id.[1]

---

[1]The statute which this opinion construes is no longer in existence. The statute was altered by the Florida legislature after litigants challenged the statute in a lawsuit based on federal constitutional grounds. The statute was never stricken by the federal courts. In fact, the statute's constitutionality was sustained in federal district court. See generally Diffenderfer v. Central Baptist Church of Miami, Fla. Inc., 316 F. Supp. 1116 (S.D. Fla. 1970), vacated as moot, 404 U.S. 412 (1972). The suit was awaiting decision by the United States Supreme Court when the legislature made the change. That Court remanded the case to the district court so the litigants could amend their pleadings to attack the new statute. 404 U.S. at 572.

The Florida Supreme Court's Central Baptist Church opinion construes the law of Florida as it existed at the time and, to that extent, the opinion remains good law. Our current statute is similar to the old Florida statute. The facts we face today bear a remarkable resemblance to those the Florida court faced. And, like that court, we face no federal constitutional challenge. The thoughtful reasoning of the Florida Supreme Court helps understand the particular problems facing us as we consider the meaning of our own statute and the facts of our own case.

I wish to suggest why the people of our state have insisted, in both constitution and statute, on granting tax exemptions to churches such as the one in this case. Churches, and downtown churches in particular, do something more than occupy valuable downtown real estate. Downtown churches offer a source of calm and hope to the frenzied workers of the commercial district. They often serve the poor and the homeless of poverty stricken downtown areas, providing shelter, food for the hungry, and counseling. Downtown churches are often beautiful to behold. They uplift. They are frequently ancient, serving as historical reminders of the courage which sustained our forebears as they constructed our cities. For the services they provide, these churches do not charge the public, nor do they make a profit. Instead, they dedicate all funds into the church and its work.

For many years, these factors have contributed to the public's decision to spare churches from the burden of taxation. It is not unreasonable for us, given the people's preference, to offer this downtown church every opportunity to prove that it complied with the terms of the statute and is entitled to the exemption.

Accordingly, I concur in the judgment of the court.

/S/

Eugene A. Cook

Justice

OPINION DELIVERED: June 10, 1992

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

In The
SUPREME COURT OF THE UNITED STATES OF AMERICA
October Term, 1993

BEXAR COUNTY APPRAISAL REVIEW BOARD
and BEXAR COUNTY APPRAISAL DISTRICT,
PETITIONERS

V.

FIRST BAPTIST CHURCH OF SAN ANTONIO
and VALERO REALTY COMPANY,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH COURT OF APPEALS DISTRICT OF TEXAS, SAN ANTONIO

APPENDIX - VOLUME II

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IN THE SUPREME COURT OF TEXAS

NO. D-0689

FIRST BAPTIST CHURCH OF SAN ANTONIO, ET AL.,

PETITIONERS

v.

BEXAR COUNTY APPRAISAL REVIEW BOARD,

ET AL.,

RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE

COURT OF APPEALS FOR THE FOURTH DISTRICT

OF TEXAS

DISSENTING OPINION

Today the court considers whether a parking lot owned by a church is "used primarily as a place of regular religious worship," when 91 percent of the lot's spaces are leased exclusively to a commercial enterprise from 7:30 a.m. to 5:00 p.m., Monday through Friday. Incredibly, the majority upholds a finding that the property is used primarily for religious purposes, despite a total absence of evidence to that effect. This holding gives an enormous tax break to virtually any business enterprise that is associated with a religious organization.

The issue in this case is not whether religious institutions deserve favorable tax treatment. No one doubts the value of the services provided by religious institutions in general, and by urban houses of worship in particular. Nor does anyone suggest that actual places of worship should be taxed. I do suggest, though, that a private business should not be allowed to profit from an exemption that was intended to shield religious worship from taxation. In the present case. it is the Valero Realty Company--not the First Baptist Church of San Antonio--that enjoyed the benefit of a tax exemption on valuable downtown property. Any change in the property's tax status would, under an express contractual

provision, affect Valero alone; it would not affect the church.[1] To that extent, the rhetoric of the concurring opinion by Justice Cook is misdirected; its position would provide a haven not for "the poor and the homeless," S.W.2d at ____, but for any profit-making, secular enterprise willing to take advantage of a tax loophole.

The Texas Constitution authorizes the legislature to exempt from taxation "actual places of religious worship." Tex. Const. art. VIII, § 2. Under that authority, the legislature has allowed religious organizations to claim an exemption for real property that is "used primarily as a place of regular religious worship." Tex. Tax Code § 11.20(a)(1). The exempted property may be used for "occasional secular purposes other than religious worship," but only if "the primary use of the property is for religious worship and and all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship. Tex. Tax Code § 11.20(d).

The parking lots at issue here were used throughout the work week by Valero Realty Company. The church generally used the parking lots only on Sundays and Wednesday evenings. To transform this commercial parking lot into space "used primarily for church purposes," the majority grasps at four peculiar criteria: (1) the purpose for which the property was purchased; (2) the church's primary use of the property; (3) the

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1 The lease agreement states:

> Lessor shall be responsible for all taxes and assessments levied on the real estate or rents of the premises; provided, however, that Lessee shall reimburse Lessor for any increase in ad valorem taxes.

(Emphasis added.) The next provision explains how the present dispute made its way to this court:

> Lessee shall have the right to prosecute an appeal of any ad valorem tax matter concerning the premises wherein Lessee may face reimbursement obligations.

In the caption of this case, Valero's continued involvement is indicated only by a vague "et al."; but in view of the lease's language, Valero has far more at stake in this proceeding than does the church.

church's right of access to the property; and (4) its general availability after working hours.

The testimony as to why the church purchased the parking lots is clearly immaterial. The test is not whether the property was purchased for religious purposes, but whether the property is used for religious purposes. If the rule were otherwise, a religious organization would be free to devote any part of its property to a tax-exempt commercial enterprise as long as the property was originally purchased for religious purposes.

Similarly irrelevant is the testimony indicating that the church's primary use of the two parking lots was to provide church members with access to the church facilities." _____S.W.2d_____. This reference reflects a basic misunderstanding of the statute. The church's primary use of the parking lots is immaterial. The exemption applies only if "the primary use of the property is for religious worship." §11.20(d). The statute does not say that the primary use of the property by the religious organization must be for religious worship; if that were the case, any incidental use of the property by the church would satisfy the "primary use" test, as long as that incidental use involved religious worship.

Nor do the church's rights of access to the parking lots establish primary use of the property. Obviously, the use of property entails more than a mere right of access; it lies in the extent to which that right is utilized. If the right is not utilized, there is no "use" of the property at all.

Finally, the majority cites evidence that church members regularly used the parking lots on Sundays and Wednesday evenings, and sometimes used them at other times of the week. ____ S.W.2d ____. This may be evidence of use for religious worship; but it is certainly not evidence of primary use for religious worship. On the contrary, this evidence establishes that the church's use of the property was secondary to Valero's use of the property. The use of the parking lots by Valero was plainly not "occasional," as section 11.20(d) requires; it was normal and

regular, and far outweighed the church's periodic use of the property.

As noted above, the Texas Constitution authorizes an exemption only for "actual places of religious worship." Tex. Const. art. VIII, § 2. This court has previously emphasized that the words "actual place" impose a significant restriction on the phrase "of religious worship," Davies v. Meyer, 541 S.W.2d 827, 831 (Tex. 1976). The majority's decision today ignores that restriction. While conceding that actual use of property is "an important factor" in determining primary use, _____S.W.2d_____, the majority totally disregards the constitutional provision making actual use the controlling factor. Instead of focusing on the actual use of the property as a place of religious worship, the majority focused on such matters as the church's subjective reasons for purchasing the property and theoretical rights of access to it. This approach has no support in the language of the statute, and is inconsistent with the constitutional provision on which the statute is based.

By straining to allow an exemption in this case, the majority compounds the error this court made in City of Austin v. University Christian Church, 768 S.W.2d 718 (Tex. 1988). Under the Tax Code, the religious use exemption is available only if all income from a secular use is "devoted exclusively to the maintenance and development of the property as a place of religious worship." Tex. Tax Code § 11.20(d). Here, as in University Christian Church, much of the income from the property was not devoted to those purposes; rather, it flowed directly into the hands of the private, commercial entity that operated the parking lots on a daily basis. Apart from violating the Tax Code, this arrangement raises serious constitutional issues, which the court of appeals will have to address if it rejects the County's factual insufficiency claims.

Even under University Christian Church, today's decision is insupportable. The court in University Christian Church did

conclude that there was a fact issue as to primary use. It did not, however, change the general rules regarding "no evidence" points of error.[2] In this case, there was not a shred of evidence indicating that the parking lots were primarily used for the purpose of religious worship. Thus, the court of appeals properly reversed the judgment of the trial court and rendered judgment that the parking lots are not exempt from taxation.

To defend the majority's result, the concurring opinion by Justice Cook resorts to mischaracterizing the law, the facts, and this dissent. Without even acknowledging the language of our constitution, the concurring opinion inaccurately states that I would allow an exemption only for property that is "actually occupied for religious purposes." ____ S.W.2d at ____. In truth, I would interpret our constitution to mean exactly what it says: that the legislature may exempt from taxation "actual places of religious worship." Tex. Const. art. VIII, § 2. A church sanctuary may not be occupied at all times; but it is clearly an actual place of religious worship, and is therefore exempt from taxation. A commercial parking lot, in contrast, is clearly not an actual place of worship, and should not be exempt from taxation. See Second Church of Christ Scientist v. City of Philadelphia, 157 A.2d 54 (Pa. 1959) (parking lot is not within constitutional provision allowing exemption for "actual places of religious worship").

By equating a commercial parking lot with a church sanctuary, ____S.W.2d at ____, the concurring opinion demeans the exemption that the framers of our constitution allowed for actual places of religious worship. The exemption in article VIII,

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[2] This court recently emphasized that our review of "no evidence" points requires a preliminary examination of "the quality of the evidence offered, inquiring whether the evidence offered has a tendency to prove the existence of a material fact." Crim v. Navistar, ___ S.W.2d ___, ___ n.1 (Tex. 1992) (citing Powers & Ratliff, Another Look at "No Evidence" and "Insufficient Evidence" Points of Error, 69 Tex. L. Rev. 515, 521-23 (1991)). Today, when the fact findings are more palatable to the majority, a markedly less-demanding level of scrutiny is applied.

section 2 was meant to guarantee all Texans the freedom to worship as they choose, without governmental interference in the form of undue burdens or benefits. As a secular, profit-making business, Valero Realty Company has nothing to do with religious worship, and should not be accorded tax benefits in the name of religious freedom.

The concurring opinion suggests that restricting the exemption to actual places of worship would raise insuperable practical difficulties, and would amount to an overwhelming hardship on the church. In fact, applying the Appraisal District's decision would not be a complicated matter, nor would it burden the church; Valero Realty Company would simply have to pay property taxes on its parking lot, just like any other business. The lease agreement, quoted supra at note 1, expressly requires Valero to assume the burden of any increase in property taxation.

A literal reading of the constitution would be consistent with the approach taken in this and other states that have construed tax exemptions for property on the basis of its use. For more than a century, this court has recognized the rule prevailing nationwide that when a building is owned by a tax-exempt organization, "the renting of even a part of the building for profit, though the proceeds be devoted exclusively to charity, subjects such part, at least, to taxation." Morris v. Lone Star Chapter No. 6, 68 Tex. 698, 704, 5 S.W. 519, 521 (1887) (citations omitted); see also Gibbons v. District of Columbia, 116 U.S. 404 (1886); Village of Oak Park v. Rosewell, 5O N.E.2d 981, 983-84 (Ill. App. Ct. 1983); In re Open Door Baptist Church, 437 A.2d 1291, 1292 (Pa. Comm. Ct. 1981); Christian Home for the Aged v. Tennessee Assessment Appeals Comm'n, 790 S.W.2d 288, 291 (Tenn. Ct. App. 1990), See generally Maurice T. Brunner, Annotation, Availability of Tax Exemption to Property Held on Lease from Exempt Owner, 54 A.L.R.3d 402, §§ 6, 14 (1973). In one of the three out-of-state cases cited by the concurring opinion, this general rule was applied to deny a complete exemption to a church

camp that was rented during part of the tax year to persons and organizations not affiliated with the church. Lutherans Outdoors in South Dakota, Inc. v. South Dakota Bd. of Education, 475 N.W.2d 140, 143 (S.D. 1991).

An exception to this rule may apply if the lessee's use of the property has some connection to the lessor's exempt purposes. For example, in another of the three out-of-state cases cited by the concurring opinion, a divinity school's parking lot was held to be exempt because it was used mainly by students and staff, only a nominal fee was charged, and the lot operated at a loss. Church Divinity School v. County of Alameda, 314 P.2d 209 (Cal. Ct. APP. 1957). In the present case, there is no suggestion that Valero's use of the property bears any relation to the church's religious purposes: Valero's employees have no apparent connection to the church; the company pays a normal, market-based rent; and the lot operates at a profit.

Rejecting the traditional approach, the concurring opinion argues that the religious-use tax exemption should be liberally construed in favor of the taxpayer. The opinion completely ignores the fact that Valero is the actual taxpayer in this case. More importantly, the opinion also overlooks the 1976 decision in which we soundly rejected the view that the concurring opinion now urges. In Davies v. Meyer, 541 S.W.2d at 829, we unanimously held that the religious-use exemption is to be "strictly and narrowly construed." This view is consistent with the approach taken by the vast majority of other states, which all adhere to the general rule that statutory or constitutional exemptions from taxation are strictly construed against the claimant and in favor of the right to tax. See, e.g., State v. Bridges, 21 So.2d 316, 317 (Ala. 1945) (calling this a "universal rule of construction"); State YMCA v. Winthrop, 29 A.2d 440, 441 (Me. 1972) ("universally accepted principle"); see generally 71 AM. JUR. 2D State and

Local Taxation § 326 (1973) ("fundamental rule of construction").[3]

One reason that religious-use exemptions have been applied restrictively is that any broader approach invites constitutional attacks. This problem is illustrated by events subsequent to the main case relied upon by the concurring opinion, Central Baptist Church v. Dade County, 216 So.2d 4 (Fla. 1968). That decision prompted a challenge based on the Religion Clauses of the First Amendment to the United states Constitution. After the United States Supreme Court agreed to review a district court's judgment upholding the exemption, the Florida Legislature fended off the constitutional challenge with prompt action; specifically, by amending the statute to allow an exemption only if the property is used predominantly for religious purposes, and only "to the extent of the ratio that such predominant use bears to the non-exempt use." Fla. Stat. § 196.192(2). See Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972). Instead of learning from Florida's experience, this court simply closes its eyes to the constitutional issues at stake, in total disregard of "our duty as a court to construe statutes in a manner which avoids serious doubts of their constitutionality." FSLIC v. Glen Ridge I Condominiums, 750 S.W.2d 757, 759 (Tex. 1988).

By reversing the judgment of the court of appeals, the majority dramatically expands another tax loophole. This action

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[3] Apparently the only state to depart from this rule is Tennessee; acknowledging that their approach is "contrary to most other states," Tennessee courts liberally construe tax exemptions in favor of "religious, scientific, literary and educational institutions." Mid-State Baptist Hosp., Inc. v. City of Nashville, 366 S.W.2d 769, 773 (Tenn. 1963). Even Tennessee, though, has declined to extend its religious-use exemption to parking lots. See City of Nashville v. State Bd. of Equalization, 360 S.W.2d 458, 467 (Tenn. 1962) ("the operation of parking lots...is not a religious undertaking, but a secular business taxed as a privilege by the state, the county, and the city"); see also Christian Home for the Aged v. Tennessee Assessment Appeals Comm'n, 790 S.W.2d 288, 291 (Tenn. Ct. App. 1990)(exemption is denied to property leased by religious institution to others).

continues a recent and unfortunate trend of the majority in disregarding legitimate taxpayer concerns, see Carrolton-Farmers Branch Ind. Sch. Dist. v. Edgewood Ind. Sch. Dist., 826 S.W.2d 489, 522 (Tex. 1992) (forcing taxpayers to continue paying an unconstitutional tax), and granting preferential tax treatment to the privileged few for which other Texans must pay. See Gifford-Hill & Co. v. Wise County Appraisal Dist., ____ S.W.2d ____ (Tex. 1991) (according preferential tax treatment to corporate gravel companies and other mineral extractors). What the majority forgets is that tax exemptions and preferences constitute indirect public subsidies that are every bit is real as the direct expenditure of public monies.[4]

The question in this particular cause is whether a parking lot used almost exclusively by a commercial enterprise is "used primarily as a place of regular religious worship." Like the recent query as to whether limestone is a mineral, this question would appear to answer itself. With repeated rationalization, however, the majority once again declares the obvious answer to be the wrong answer. The majority is oblivious to the plight of the ordinary taxpayer who cannot escape paying taxes and who must, in addition, foot the bill for those who escape tax liability through a judicially-created loophole. The tax fairness contemplated by the Texas Constitution has been converted into tax injustice.

I would affirm the judgment of the court of appeals. Therefore, I dissent.

/S/

Oscar H. Mauzy,
Justice

Justices Doggett and Gammage join in this dissenting opinion.
OPINION DELIVERED: June 10, 1992

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[4] The legislature has recognized this reality by enacting section 403.014 of the Texas Government Code, which requires the Comptroller to report annually on the cost of certain tax exemptions or tax expenditures. See Texas Comptroller of Public Accounts, Sales and Franchise Tax Exemptions (1991).

THE STATE OF TEXAS

To the Fourth Court of Appeals, Greetings:

Before our Supreme Court on the 10th day of June A.D. 1992, the Cause, upon writ of error, to revise or reverse your Judgment between

FIRST BAPTIST CHURCH OF SAN ANTONIO ET AL.

VS.

BEXAR COUNTY APPRAISAL REVIEW BOARD ET AL.

No. D-0689 in the Supreme Court of Texas

No. 04-89-00543-CV in the Fourth Court of Appeals, Texas, was determined; and therein our said Supreme Court entered its judgment or order in these words:

"THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Fourth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

"IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) The cause is remanded to the Court of Appeals for the Fourth District for further proceedings in conformity with the opinion of this Court;

3) First Baptist Church of San Antonio et al. shall recover from Bexar County Appraisal Review Board et al., which shall pay, the costs incurred in this Court in this cause."

"A copy of this judgment and of the Court's opinion is certified to the Court of Appeals for the Fourth District. The original record and all instruments filed with the court of appeals

shall accompany the mandate of this Court to the Fourth Court of Appeals."

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have recognized, obeyed, and executed.

Wherefore the Honorable Thomas R. Phillips, Chief Justice of our said

Supreme Court, with the seal thereof annexed, at the City of Austin, this the 17th day of July A.D. 1992

JOHN T. ADAMS, Clerk
By_____
Courtland Crocker, Deputy

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO
OPINION
Appeal No. 04-89-00543-CV
BEXAR COUNTY APPRAISAL REVIEW BOARD,et. al.,
Appellant
v.
FIRST BAPTIST CHURCH, et. al.,
Appellee
Appeal from the 224th District Court
of Bexar County
Trial Court No. 84-CI-20348
Honorable Carolyn H. Spears, Judge Presiding
Opinion by: David Peeples, Justice
Sitting: Blair Reeves, Chief Justice
Shirley W. Butts, Justice
David Peeples, Justice
Delivered and Filed: November 12, 1992
AFFIRMED AS REFORMED

Earlier in this property tax exemption case, we held that the evidence was legally insufficient to support the jury's finding that a church parking lot was used primarily for religious purposes. Bexar County Appraisal Review Bd. v. First Baptist Church, 800 S.W.2d 892 (Tex. App.--San Antonio 1990). The supreme court disagreed with that ruling and returned the cause to us for consideration of points of error that we did not reach. First Baptist Church v. Bexar County Appraisal Review Bd., 833 S.W.2d 108 (Tex. 1992).

Appellants Bexar County Appraisal Review Board and the Bexar Appraisal District (collectively referred to as the district) appeal from a judgment based on a jury finding that two parking lots owned by the First Baptist Church of San Antonio (the church) and leased to the Valero Realty Company (Valero) are

exempt from property taxes for 1984-1986. The judgment ordered that the value of the property on the appraisal roll be reduced to zero, and decreed that the property is exempt from taxation for the three years. The judgment also awarded the church attorney's fees. Additional facts may be found in the two reported opinions.

The district complains that: (1) the judgment exempting the property from taxation is unconstitutional, (2) the award of attorney's fees was unauthorized, and (3) the court made certain erroneous rulings during trial.[5] In one cross-point, the church and Valero seek damages on the ground that the district's claim of unconstitutionality is frivolous and was made for purposes of delay. The district also contends that the evidence is factually insufficient, but the supreme court held the evidence legally sufficient, and in view of its construction of the exemption statute, we hold that the evidence is factually sufficient as well.

I.

We first consider the district's argument that the tax exemption violates the First and Fourteenth Amendments to the United States Constitution, and article one, § 6 and article eight, § 2 of the Texas Constitution. The United States Supreme Court has approved essentially the same kind of property tax exemption, provided the exemption applies not only to churches but also to other nonprofit entities. See Walz v. Tax Comm'n, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970); see also Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 11, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (opinion of Brennan, Marshall, & Stevens, JJ.) (stressing that the property tax exemption at issue in Walz was granted to nonprofit entities as well as religious bodies). The statute before

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[5] The district also argues that the trial court erred in its submission of jury question one and its accompanying instructions. The supreme court dismissed that argument as meritless and we need not consider it further. See 833 S.W.2d at 110 n.2. Contrary to the district's suggestions, the issue did not improperly comment on the weight of the evidence or advise the jury of the effect of its answers.

us extends an exemption to various nonsectarian groups, such as charities, schools, and veterans' organizations. See TEX. PROP. TAX CODE 11.11 et seq. (Vernon 1992). Under Walz and Texas Monthly, the exemption statute does not violate the federal constitution on its face or as applied to the church's parking lot.

* * * * *

We have considered all the district's complaints about the judgment. With the exception of the award of attorney's fees, all are overruled.

We reform the judgment to delete the award of attorney's fees. As reformed, the judgment is affirmed.

DAVID PEEPLES
Justice

PUBLISH

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO
JUDGMENT
Appeal No. 04-89-00543-CV
BEXAR COUNTY APPRAISAL REVIEW BOARD, et.al.,
Appellant
v.
FIRST BAPTIST CHURCH, et. al.,
Appellee
Appeal from the 224th District Court
of Bexar County
Trial Court No. 84-CI-20348
Honorable Carolyn H. Spears, Judge Presiding
BEFORE CHIEF JUSTICE REEVES AND JUSTICES BUTTS AND PEEPLES

JUDGMENT

In accordance with this Court's opinion of this date, we have considered all the district's complaints about the judgment. With the exception of the award of attorney's fees, all are overruled.

We REFORM the judgment to delete the award of attorney's fees. As REFORMED, the judgment is AFFIRMED.

It is further ORDERED that costs are assessed one-fourth against First Baptist Church, et al, and three-fourths against Bexar County Appraisal Review Board, et al.

SIGNED November 12, 1992.

/S/
DAVID PEEPLES
JUSTICE

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams. Clerk
June 3, 1993

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707 West Tenth Street
Austin, TX 78701

Mr. Robert J. Myers
The Law Offices of Hickey & Myers
7800 Vantage Drive
I-H 10 West - Suite 600
San Antonio, TX 78230-4734

RE: Case No. D-3487
Style: BEXAR COUNTY APPRAISAL REVIEW BOARD and BEXAR COUNTY APPRAISAL DISTRICT
v. FIRST BAPTIST CHURCH OF SAN ANTONIO and VALERO REALTY COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ

Denied." Respondents' motion to disregard petitioners' second point of error is overruled.

Sincerely,
John T. Adams, Clerk
BY: /S/
Blanca Morin, Deputy

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams. Clerk
October 27, 1993

Mr. Dennis K. Drake
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Hon. William W. Kilgarlin
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Mr. Robert J. Myers
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San Antonio, TX 78230-4734

RE: Case No. D-3487
Style: BEXAR COUNTY APPRAISAL REVIEW BOARD and BEXAR COUNTY APPRAISAL DISTRICT
v. FIRST BAPTIST CHURCH OF SAN ANTONIO and VALERO REALTY COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,
JOHN T. ADAMS. CLERK
BY: /S/
Michael C. Murphey,
Deputy Clerk

FIRST BAPTIST CHURCH and VALERO REALTY COMPANY
VS.
BEXAR APPRAISAL DISTRICT and
BEXAR APPRAISAL REVIEW BOARD
IN THE DISTRICT COURT
225TH JUDICIAL DISTRICT

ENTRY: Recorded in Volume 801A at pages 0232-0234, minutes of the 224th Judicial District Court.

RENDERED: July 17, A.D., 1989

FINAL JUDGMENT

On the 23rd day of May, 1989, came this cause on for trial on the merits. Plaintiffs, FIRST BAPTIST CHURCH OF SAN ANTONIO and VALERO REALTY COMPANY, appeared in person and by and through their counsel of record and announced ready for trial. Defendants, BEXAR APPRAISAL DISTRICT and BEXAR APPRAISAL REVIEW BOARD, appeared in person and by and through their counsel of record, and further announced ready for trial.

TR198

A jury was duly and properly impaneled, and having heard the evidence, and having been instructed in matters of law by the Court, the following two questions and no others were submitted for the jury's consideration, and the jury was instructed as follows, and the jury having considered the evidence and having been the instructed in the law by the Court, the jury answered as is indicated below where those notations are made after said questions:

QUESTION NO. 1

Find, from a preponderance of the evidence, whether the First Baptist Church of San Antonio is entitled to an exemption on the property the subject of this lawsuit.

We the Jury answer:

TR198

The property should be exempt: yes

The property should not be exempt:

You are instructed that in order to qualify for an exemption that the property must be owned by a religious organization; be used primarily as a place of regular religious worship; and, be reasonably necessary for engaging in religious worship. You are further instructed that the use of the property for occasional secular purposes, other than religious worship, does not result in loss of the exemption if the primary use of the property is for religious worship, and all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship.

"Religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage and commitment in behalf of a religious faith.

TR199

You are further instructed in considering whether the property the subject of this suit should be exempt, that a place of religious worship includes not only the sanctuary, but also those grounds and structures surrounding the sanctuary which are necessary for the use and enjoyment of the church.

QUESTION NO. 2

Find, from a preponderance of the evidence, the amount of reasonable attorney's fees, if any, incurred by Plaintiff in connection with this cause as concerns the market value of the properties the subject of this suit.

Answer in dollars and cents, if any, as to each:

Through the trial of this case: $54,439.18

Through the Court of Appeals, if necessary:

$44,000.00

Through the Supreme Court, if necessary:

$27,000.00

You are instructed as concerns Question No. 2 that in considering what is a reasonable attorney

TR199
fee, if any, that you could consider the time and labor expense by the attorneys for the Plaintiff in TR199
connection with the litigation, the nature and complexity of the case, the skill and degree of sophistication of the attorneys for the Plaintiff in prosecuting the case, the reputation and experience of the attorneys, and the amounts of fees and services charged by other attorneys in and around San Antonio, Bexar County, Texas, for rendering like or similar services to clients as those rendered in this case.

The verdict was returned with the answers as above indicated, and was signed by Meluina Benesch Sheridan, Presiding Juror.

The Court, having considered the evidence, the pleadings, the jury's verdict and further having heard the argument of counsel and having considered the law applicable, is of the opinion and finds that the jury's verdict is just, and the Court
TR200
accepts said verdict, and finds that it should form the basis of this Court's judgment.

The following properties are those the subject of this suit.

BEXAR APPRAISAL DISTRICT ACCT. NO.

01761-000-00-10
01761-000-00-20
01761-000-00-26
01761-000-00-30
01761-000-00-40
01761-000-00-50
01761-000-00-60
01761-000-00-80
01761-000-00-90
01760-000-00-40

These properties are known generically as the First Baptist Church parking lots, and more specifically, as according to the

evidence, the "McCullough Lot" and "the River Lot".
TR200

It is accordingly ORDERED, ADJUDGED and DECREED that the properties the subject of this suit be, and they are hereby
TR200
declared exempt under the provisions of Sec. 11.20 Texas Tax Code. As the appraised value of the property, according to the appraisal roll exceeds the appraised value required by law, the First Baptist Church is entitled to a reduction of the appraised value on the appraisal roll to zero for each of the tax years in question (1984, 1985, 1986); thus it is accordingly

ORDERED that the Defendant, BEXAR APPRAISAL DISTRICT, correct the appraisal roll to reflect that the market value of the properties the subject of this suit for tax years 1984, 1985 and 1986 is zero, and the Defendant, BEXAR APPRAISAL DISTRICT, is hereby ORDERED to comply with the provisions of Sec. 42.41, 42.42 and 42.43 Tax Code in a manner not inconsistent with this Court's judgment. The Court declares and concludes that Defendant, BEXAR APPRAISAL DISTRICT, should apply the provisions of Sec. 23.13 Tax Code to Valero Realty Company's interest in the leasehold estate for the tax years 1984, 1985 and 1986.

It is further ORDERED that Judgment be, and it is hereby rendered, over and against the BEXAR APPRAISAL DISTRICT and BEXAR APPRAISAL REVIEW BOARD, and in favor of FIRST BAPTIST CHURCH OF SAN ANTONIO and VALERO REALTY COMPANY, INC., in the sum of ONE HUNDRED TWENTY FIVE THOUSAND FOUR HUNDRED THIRTY NINE and 18/100 ($125,439.18) DOLLARS as reasonable attorneys fees incurred and/or to be incurred by Plaintiffs in connection with this cause, provided, however, that this Judgment shall be credited in the amount of TWENTY SEVEN THOUSAND TR201

DOLLARS ($27,000.00) in the event no appeal or Application for Writ of Error is taken to the Texas Supreme Court, and further conditioned that this Judgment shall be credited in the amount of FORTY FOUR THOUSAND DOLLARS ($44,000.00) in the event no TR202 appeal is taken to the Court of Appeals from this Court's Judgment. All costs herein having been paid by the party incurring same, let no execution issue.

All other and further relief requested by the parties and not herein granted is hereby specifically denied.

RENDERED, SIGNED and ENTERED this 17 day of July, 1989.

/S/
CAROLYN H. SPEARS
Judge Presiding

TR202

FIRST BAPTIST CHURCH AND

VALERO REALTY COMPANY

V.

BEXAR APPRAISAL DISTRICT and

BEXAR APPRAISAL REVIEW BOARD

NO. 86-CI-20348

225TH JUDICIAL DISTRICT COURT

FILING: FILED
May 12, 1989
4:47 p.m.
David J. Garcia
District Clerk
Bexar Co., Texas
By Maria E. Perez,
Deputy

DEFENDANTS' SECOND AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

The BEXAR APPRAISAL DISTRICT and the BEXAR APPRAISAL REVIEW BOARD, Defendants in the above-captioned lawsuit, file this their Second Amended Original Answer in response to Plaintiffs'

TR111

Third Amended Original Petition and as grounds therefore would show the Court the following:

AFFIRMATIVE DEFENSES

TR111

. . .

CONSTITUTIONAL LIMITATIONS

IX.

Plaintiff Church, in choosing to lease some of its parking spaces to Valero for a sum in excess of $100,000.00 a year has converted this property into a commercial profit-making

enterprise. Accordingly, the granting of an exemption under the facts and circumstances of this case would result in an impermissible state subsidy and/or sponsorship of a religious enterprise in violation of the First Amendment to the United States Constitution and/or Article 1, §6 of the Texas Constitution.
TR114

. . .

WHEREFORE, PREMISES CONSIDERED, Defendants request that upon a final trial, Plaintiffs' cause TR115
of action be dismissed and a take-nothing judgment be awarded in favor of Defendants and/or and for such other and further relief to which Defendants may be justly entitled at law or in equity.

Respectfully submitted,

/S/

DENNIS K. DRAKE
State Bar No. 06105000
Lincoln Center, Suite #235
7800 I.H. 10 West
San Antonio, Texas 78230
(512) 366-9636

STATE OF TEXAS §
§
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared WALTER STONEHAM, who being by me first duly sworn, did depose and state that he is the duly authorized representative for the BEXAR APPRAISAL DISTRICT, Defendant in the above-numbered and entitled cause, and in his capacity as said designated representative states that each and every fact stated in
TR115-116

Defendants' Second Amended Original Answer is true and correct.

By: /S/

Title: CHIEF APPRAISER

SUBSCRIBED AND SWORN TO before me on this 11th day of May 1989.

/S/

Notary Public
State of Texas
Printed or Typed Name of
Notary:

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document of notice (identified below) to which this certificate is attached was served, prepaid, on this date below upon each listed party or, if of record in this cause, that party's named attorney(s) of record at his/her/their respective last address as follows:

DOCUMENT/NOTICE:

DEFENDANTS' SECOND AMENDED ORIGINAL ANSWER
TR116

PARTY OR ATTORNEYOF RECORD	METHOD OF SERVICE
Mr. Robert J. Myers Willis, Hickey & Hougham 7800 IH-10 West, Suite 600 San Antonio, Texas 78230	HAND-DELIVERED

Date: 5/12/89

/S/

DENNIS K. DRAKE

TR116

FIRST BAPTIST CHURCH AND VALERO REALTY COMPANY

v.

BEXAR APPRAISAL DISTRICT AND BEXAR APPRAISAL REVIEW BOARD

No. 86-CI-20348

225TH DISTRICT COURT

FILING: FILED
May 16, 1989
4:39 p.m.
David J. Garcia
District Clerk
Bexar Co., Texas
By Maria E. Perez
Deputy

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME BEXAR APPRAISAL DISTRICT and BEXAR APPRAISAL REVIEW BOARD, Defendants in the above-captioned lawsuit, and file this, their, Motion to Dismiss, and as grounds therefor would show the Court the following:

TR126

. . .

IV.

Plaintiff, FIRST BAPTIST CHURCH, in choosing to lease some of its parking spaces to VALERO REALTY COMPANY for a sum in excess of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) a year has converted this property into a commercial profit-making enterprise. Accordingly, the granting of an exemption under the facts and circumstances of this case would result in an impermissible state subsidy and/or sponsorship of a religious enterprise in violation of the First Amendment of the United States Constitution and/or

Article 1, Section 6 of the Texas Constitution.
TR127

. . .

WHEREFORE, PREMISES CONSIDERED, Defendants request that, upon a final trial,, Plaintiffs' cause of action be dismissed and a take nothing judgment be awarded in favor of Defendants and/or for such other and further relief to which Defendants may be justly entitled at law or in equity.

Respectfully submitted,

/S/

DENNIS K. DRAKE
State Bar No. 06105000
Law Offices of Dennis K. Drake
Lincoln Center, Suite 235
7800 IH 10 West
San Antonio, Texas 78230
(512) 366-9636

TR128

F I A T

Defendants' Motion to Dismiss, having been presented to me in the above entitled and numbered cause, same is set for hearing on Monday, the 22nd day of May, 1989, at 3:00 o'clock p.m., in the Courtroom of Judge Carolyn Spears, the 224th District Court, Bexar County Courthouse, San Antonio, Texas.

SIGNED this 16th day of May, 1989.

/S/

JUDGE CAROLYN SPEARS

TR129

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document or notice (identified below) to which this certificate is attached was served, prepaid, on this date below upon each listed party or, if of record in this cause, that party's named attorney(s) of record at

his/her/their respective last address as follows:

DOCUMENT/NOTICE:

MOTION TO DISMISS

PARTY OR ATTORNEY OF RECORD	METHOD OF SERVICE
Mr. Robert J. Myers Willis, Hickey, Hougham & Myers 7800 IH 10 West, Suite 600 San Antonio, Texas 78230	HAND DELIVERY

Date: 5/16/89

_____

DENNIS K. DRAKE

TR130

NO. 86-CI-20348
DISTRICT COURT 225TH JUDICIAL DISTRICT COURT
BEXAR COUNTY, TEXAS
****
FIRST BAPTIST CHURCH OF SAN ANTONIO AND
VALERO REALTY COMPANY VS.
BEXAR APPRAISAL DISTRICT and
BEXAR APPRAISAL REVIEW BOARD

FILING: May 22, 1989
2:40 p.m.
David J. Garcia
Clerk of the District Courts
Bexar Co., Texas
By Jane Vollmer,
Deputy

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND JOINT MOTION TO STRIKE PLAINTIFF'S FOURTH AMENDED PETITION

TR162

To THE HONORABLE JUDGE OF SAID COURT:

Now comes BEXAR APPRAISAL DISTRICT and BEXAR APPRAISAL REVIEW BOARD, Defendants in the above-styled and numbered cause, and file this their Memorandum of Law In Support of Their Motion to Dismiss and Joint Motion to Strike Plaintiffs' Fourth Amended Petition, and in support thereof would respectfully show unto the court the following:

TR162

. . .

IX.

Unconstitutional Application

Plaintiffs totally misinterpret Defendants' constitutional arguments contained in ¶IV of Defendants' Motion to Dismiss. The Bexar Appraisal District and the Appraisal Review Board are not seeking a determination that any statute is unconstitutional. To

the contrary, it is the position of the Defendants that all provisions of the *Prop. Tax Code* pertinent to this case are
TR168
constitutional, but if the Defendants granted the exemption requested by Plaintiffs, that same would be an unconstitutional application of the statute, and would amount to an impermissible state subsidy and/or sponsorship of a religious enterprise.
TR168

X.

Defendants have the duty to insure that an exemption or partial exemption is not improperly granted, V.T.C.A. *Prop. Tax Code* §41.01(2), and to take specific action if the requirements of law are not met, V.T.C.A. *Prop. Tax Code* 41.02. Plaintiffs herein are not only demanding that Defendants violate their statutory duty, but Plaintiff First Baptist is also demanding that their profit-making enterprise, which other nearby private parking lot operators must compete with, be granted an exemption that Defendants do not grant to any other religious organization within the Appraisal District.
TR169

XI.

In Plaintiffs' Response to Defendants' Motion to Dismiss, they argue that "incidental income related to a secular use does not destroy the exemption, so long as all such income is devoted exclusively to the maintenance and development of the property." Besides being a clear admission by the Plaintiffs that this enterprise benefits solely and exclusively First Baptist Church of San Antonio (therefore serving a non-secular purpose), their statement fails to point out the balance of the test: the secular use must be "occasional" and the primary use of the property must be for religious worship. V.T.C.A. Prop. Tax Code §11.20(d).

Plaintiffs further argue that "the "subsidy" to the extent same might exist, is conferred on a wide variety of non-sectarian groups, as well as religious organizations in pursuit of legitimate

ends," and as authority therefore, reference exemptions provided other entities. What Plaintiffs do not provide is any authority showing that an exemption under the facts and circumstances of this case has ever been allowed and upheld in the State of Texas. Plaintiffs have, through a strained sense of logic and application of law to facts, argued to the Court that the requirements of Texas Monthly, Inc. vs. Bullock, 109 Supreme Court 890 (1989) have been met, and that the factual scenario in Walz vs. Tax Commission of New York City, 397 U.S. 664 (1970) is identical to the facts in the case at bar.
TR169-170

However, in the Texas Monthly Case, United States Supreme Court struck down a tax exemption allowed to a religious organization~s publication of religious periodicals which was not allowed to a non-religious organization's publication of religious periodicals. Id at 905. The Court therein stated: what is crucial is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for non-religious groups." Id at 899. Here, First Baptist wants an exemption for a profit making enterprise (i. e. parking lot operations), while at the same time such an exemption would not be allowed for a non-religious organization's operation of a parking lot. Furthermore, Plaintiffs' Admission in their response, that all income from this enterprise is devoted exclusively to the maintenance and development of the property, flies directly in the face of the United States Supreme Court's mandate that an overarching secular purpose be served.
TR170

Plaintiffs reliance upon the *Waltz* case is totally misplaced. In the Waltz case, the exemption in issue was granted for property solely used for religious purposes. Id et 666. (emphasis supplied) This type exemption was upheld. Id et 680. Here, it is undisputed that the parking lot in question is not used exclusively and solely for religious worship. Besides dealing with

a statute and facts that would bear no correlation to the statute and facts at issue in this case, the Supreme Court in Waltz did cite an 1886 case wherein a tax exemption was denied for land owned by a church but used to produce income. Id et 679.
TR171

. . .

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that their Motion to Dismiss and Joint Motion to Strike be granted.
TR172

Respectfully submitted,
LAW OFFICES OF DENNIS K. DRAKE
Lincoln Center, Suite #235
7800 IH-10 West
San Antonio, Texas 78~30
(512) 366-9636
By: /S/
DENNIS K. DRAKE
State Bar No. 061050000

TR172

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document of notice (identified below) to which this certificate is attached was served, prepaid, on this date below upon each listed party or, if of record in this cause, that party's named attorney(s) of record at his/her/their respective last address as follows:

DOCUMENT/NOTICE:
MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND JOINT MOTION TO STRIKE PLAINTIFFS' FOURTH AMENDED PETITION

PARTY OR ATTORNEY OF RECORD METHOD OF SERVICE

Mr. Robert J. Myers HAND-DELIVERED
Willis, Hickey, Hougham & Myers
7800 IH-10 West, Suite 600
San Antonio, Texas 78230

Date: 5/22/89

/S/
DENNIS K. DRAKE

TR172

FIRST BAPTIST CHURCH OF SAN ANTONIO
AND VALERO REALTY COMPANY
VS.
BEXAR APPRAISAL DISTRICT AND
BEXAR APPRAISAL REVIEW BOARD
224TH JUDICIAL DISTRICT
STATEMENT OF FACTS
PRE-TRIAL HEARINGS
VOLUME II OF 9 VOLUMES
MAY 10 & 22, 1989
(VOLUME I IS CLERK'S TRANSCRIPT)

APPEARANCES:

PRESIDING: HONORABLE CAROLYN H. SPEARS
Judge, 224th District Court
Bexar County Courthouse
San Antonio, Texas 78205

FOR THE
PLAINTIFFS: MR. ROBERT J. MYERS
Willis, Hickey, Hougham & Myers
7800 IH-10 West, Suite 600
San Antonio, Texas 78230
(512) 340-6984

AND

MR. WILLIAM W. KILGARLIN
Powell, Popp & Ikard
707 West Tenth Street
Austin, Texas 78701
(512) 473-2661

FOR THE
DEFENDANT: MR. DENNIS K. DRAKE
MR. ROBERT E. ETLINGER
7800 IH-10 West, Suite 235
San Antonio, Texas 78230
(512) 366-9636

--*-*-*-*-*-*-*-*-*-*-*-*-*

MARY ORALIA BERRY, CSR, RPR
OFFICIAL COURT REPORTER
224TH DISTRICT COURT
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205
(512) 220-2132

PROCEEDINGS

MAY 22, 1989

MONDAY

(At 3:50 p.m., the following
(proceedings were had before
(the Court:

. . .

THE COURT: Good afternoon. Do you have an agreement as to which motions we will hear this afternoon?

MR. DRAKE: Yes, Your Honor. Dennis Drake for the record. I'm the attorney for the Appraisal Review Board and the Bexar Appraisal District in this lawsuit, for the Defendants in this lawsuit. The motions that are before the Court are Defendants' Motion to Dismiss and Defendants' Motion to Strike Plaintiffs' Fourth Amended Petition, Your Honor.

SF36

. . .

That is, they are coming forward -- and simply stated, Your Honor, they're asking that we exempt this church from the payment of any taxes when that offends the First Amendment to the United States Constitution and also offends Article I, Section 6 of the Texas Constitution. The Supreme Court of the United States has stated that the Constitution -- or the test for a constitutional religious exemption must serve a secular purpose.

And the bottom line of that case, which is the **Texas Monthly case vs. Bullock** that's cited in the brief, Your Honor, is that any exemption to a church which relieves the church of paying taxes on a profit-making enterprise cannot serve a secular purpose. The reason for that is, it would result in the subsidizing of a religious organization to the detriment of secular entities who must compete with that religious organization.

SF49

Judge, I have cited both those cases, and with the permission of the Court, I would like to -- I have a copy here, and

I've also provided opposing counsel previously with the United States Supreme Court case, which is styled **Texas Monthly vs. Bob Bullock.**

And I've also, Your Honor, provided a copy to the Court of the Court of Civil Appeals decision which was -- the dissenting opinion was basically approved when it went before the United States Supreme Court.

And in that case, Your Honor, JusticeCarroll said, in his dissenting opinion, that
SF50
although **Texas Monthly** did not preserve on appeal the Texas constitutional provisions, that it would have been even a stronger case from the State Constitution than it was for the United States Constitution. And for that purpose, I provided the Court of Civil Appeals case out of Austin with Justice Carroll's dissent.
SF51

. . .

Again, I want to stress to the Court, I am not here at this time saying that the statute is unconstitutional. I believe that the misapplication that these Plaintiffs want the Court to apply to what is basically a sham and a
SF53
charade would make it unconstitutional, because Valero is the one charged under the terms of the lease with paying any of the taxes -- or at least above the set rate for the taxes.

Furthermore, in establishing any exemption below that rate, which is about $6,000 a year to the church, the church is in direct competition with other parking lots that make a profit. And they're getting the benefit of a religious exemption for what is basically a business venture. That directly violates the test that is set forth in this United States Supreme Court Bullock vs. -- or **Texas Monthly vs. Bullock**.
SF54

. . .

MR. DRAKE: Your Honor, let me address the United States constitutional issue, a second. In the **Texas Monthly** case, the U.S. Supreme Court addressed in a footnote found at page 898, footnote number two on page 898, they address the **Walz** case. And they say that the finding in the **Walz** case is not to be interpreted, and "We in no way intimated that the exemption would have been valid had it applied only to the property of religious groups, or had it lacked a permissible secular objective."

If you go back to page 897 on the **Texas Monthly** case, on the right-hand side, Your Honor, at the second paragraph, it says: "In all of these cases," -- talking about sustaining a property tax exemption for religious properties, no less than to real estate owned by nonprofit organizations; in other words, it's not just a sales tax case.

SF61

"In all of these cases, we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups, as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect."

What we have here in this case is a lack of secular purpose and effect.

SF61

. . .

MR. DRAKE: Your Honor, I'm not arguing that there are other areas in Chapter 11 that are granted exemptions. What I'm saying here is that to grant an exemption to a parking lot where the church has paid over $100,000 a year for the use of that by Valero for those lots, and then get an exemption for what is business purpose, not a religious purpose -- in other

words, it's a business purpose; it's changed the whole character of

the property -- would be violating the Secular Purpose Clause of the Constitution that is addressed in Texas Monthly.

I'm not attacking the whole scheme, and never meant to of Chapter 11. I don't disagree SF62 with anything that's in Chapter 11. What I do disagree with is, they've come into court seeking to have a misapplication of Section 11.20 of the Property Tax Code.
SF63

. . .

THE COURT: Anything else on the Motion to Dismiss?

MR. DRAKE: No, Your Honor, I do not.
SF71

THE COURT: I'll deny the Motion to Dismiss.
SF72

FIRST BAPTIST CHURCH OF SAN ANTONIO
AND VALERO REALTY COMPANY

v.

BEXAR APPRAISAL DISTRICT AND
BEXAR APPRAISAL REVIEW BOARD

No. 86-CI-20348

224TH JUDICIAL DISTRICT COURT

ENTRY: Recorded in Volume 790A at pages 1001-1002, Minutes of the 224th Judicial District Court.

RENDERED: May 25, A.D., 1989.

ORDER

On the 22nd day of May, 1989, in the above numbered and entitled cause, came on to be heard Defendants' Motion to Dismiss. Defendants, **BEXAR APPRAISAL DISTRICT** and **BEXAR APPRAISAL REVIEW BOARD,** appeared by and through their counsel and announced ready. Plaintiffs, **FIRST BAPTIST CHURCH OF SAN ANTONIO** and **VALERO REALTY COMPANY,** appeared by and through their counsel and announced ready.

TR173

WHEREUPON, the Court, after considering the arguments of counsel and the documents on file in this matter, finds that Defendants' Motion should be denied.

IT IS, THEREFORE, ORDERED that Defendants' Motion to Dismiss is hereby in all things denied.

SIGNED this 25th day of May, 1989.

/S/

JUDGE CAROLYN SPEARS

APPROVED AS TO BOTH FORM AND SUBSTANCE:

/S/

ROBERT J. MYERS

State Bar No. 14765 380

Willis, Hickey, Hougham & Myers

7800 IH 10 West, Suite 600

San Antonio, Texas 78230-4734

(512) 340-2200

ATTORNEY FOR PLAINTIFFS

TR174

APPROVED AS TO FORM:

/S/

DENNIS K. DRAKE

State Bar No. 06105000

Law Offices of Dennis K. Drake

Lincoln Center, Suite 235

7800 IH 10 West

San Antonio, Texas 78230

(512) 366-9636

ATTORNEY FOR DEFENDANTS

TR174

FIRST BAPTIST CHURCH OF SAN ANTONIO AND
VALERO REALTY COMPANY

v.

BEXAR APPRAISAL DISTRICT AND
BEXAR APPRAISAL REVIEW BOARD

No. 86-CI-20348

225TH JUDICIAL DISTRICT COURT

FILING: FILED

August 14, 1989
11:26 a.m.
David J. Garcia
District Clerk
Bexar Co., Texas
By Bachyen Nenyen,
Deputy

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME BEXAR APPRAISAL DISTRICT and BEXAR APPRAISAL REVIEW BOARD, Defendants herein, and file this, their Motion for New Trial, and in support thereof, respectfully show unto the Court the following:

TR203

. . .

Defendants are entitled to a new trial in that the granting of an exemption under the facts and circumstances of this case would, as a matter of law, result in an impermissible state subsidy and/or sponsorship of a religious enterprise in violation of the First Amendment to the United States Constitution and/or Article 1, §6 of the Texas Constitution.

TR204

. . .

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that upon notice and hearing, the Court grant a new trial and that the Court set aside the judgment

previously rendered herein, and grant the Defendants a new trial.

Respectfully submitted,

LAW OFFICES OF DENNIS K. DRAKE
Lincoln Center, Suite 235
7800 IH 10 West
San Antonio, Texas 78230
By: /S/
DENNIS K. DRAKE
State Bar No. 06105000

TR207

FIAT

Defendants' Motion for New Trial, having been presented to me in the above entitled and numbered cause, same is set for hearing on Tuesday, the 22nd day of August, 1989, at 8:30 o'clock a.m. in the Courtroom of the 224th District Court, Judge Carolyn H. Spears, Bexar County Courthouse, San Antonio, Bexar County, Texas.

SIGNED this 14th day of August, 1989.

/S/ Carolyn H. Spears
JUDGE PRESIDING

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document or notice (identified below) to which this certificate is attached was served, prepaid, on this date below, upon each listed party or, if of record in this cause, that party's named attorney(s) of record at his/her/their respective last address as follows:

DOCUMENT/NOTICE:
MOTION FOR NEW TRIAL
TR208

PARTY(S) OR ATTORNEY(S): **METHOD OF SERVICE:**

Mr. Robert J. Myers — HAND DELIVERY
Willis, Hickey, Hougham & Myers
7800 IH 10 West, Suite 600
•San Antonio, Texas 78230
DATE: 8/14/89

/S/
DENNIS K. DRAKE

TR208

FIRST BAPTIST CHURCH OF SAN ANTONIO
AND VALERO REALTY COMPANY
VS.
BEXAR APPRAISAL DISTRICT AND
BEXAR APPRAISAL REVIEW BOARD
224TH JUDICIAL DISTRICT
STATEMENT OF FACTS
PRE-TRIAL HEARINGS
VOLUME VIII OF 9 VOLUMES
JUNE 29, 1989 AND AUGUST 22, 1989
APPEARANCES:

PRESIDING: HONORABLE CAROLYN H. SPEARS
Judge, 224th District Court
Bexar County Courthouse
San Antonio, Texas 78205

FOR THE
PLAINTIFFS: MR. ROBERT J. MYERS
Willis, Hickey, Hougham & Myers
7800 IH-10 West, Suite 600
San Antonio, Texas 78230
(512) 340-6984

AND

MR. WILLIAM W. KILGARLIN
Powell, Popp & Ikard
707 West Tenth Street
Austin, Texas 78701
(512) 473-2661

FOR THE
DEFENDANT: MR. DENNIS K. DRAKE
MR. ROBERT E. ETLINGER
7800 IH-10 West, Suite 235
San Antonio, Texas 78230
(512) 366-9636

--*-*-*-*-*-*-*-*-*-*-*-*

MARY ORALIA BERRY, CSR, RPR
OFFICIAL COURT REPORTER
224TH DISTRICT COURT
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205
(512) 220-2132

PROCEEDINGS
August 22, 1989
Tuesday

(The following
(proceedings were had
(before the Court:

MR. ETLINGER: Your Honor, as you know, this Court presided over the case of **First Baptist Church of San Antonio and Valero Realty Company vs. Bexar Appraisal District, et al**, Cause Number 86-CI-20348. And after trial and based upon the verdict, the Judge entered a judgment therein. We are now here on behalf of the Appraisal District and the Bexar Appraisal Review Board asserting a Motion for New Trial.
SF1041

. . .

And last, with regard to Special Issue Number 1, again, as we had argued in the past, that on the facts that got presented during the course of this trial, to grant this church an exemption would amount to an unconstitutional -- an impermissible and unconstitutional state subsidy of religion.
SF1042

. . .

THE COURT: I'll deny the Motion for New Trial.

. . .

SF1054

FIRST BAPTIST CHURCH OF SAN ANTONIO AND
VALERO REALTY COMPANY

v.

BEXAR APPRAISAL DISTRICT AND
BEXAR APPRAISAL REVIEW BOARD

CAUSE NO. 86-CI-20348

224TH JUDICIAL DISTRICT COURT

ENTRY: Recorded in Volume 816A at page 0037, minutes of the 224th Judicial District Court.

RENDERED: September 11, A.D., 1989.

ORDER OVERRULING MOTION
FOR NEW TRIAL

On the 22nd day of August, 1989, came onto be heard Defendants Motion for New Trial in the above referenced cause. All parties appeared by and through their attorneys of record and announced ready. The court, having examined the motion, and having heard the argument of counsel is of the opinion and so finds that said motion should be in all things denied.

TR210

It is accordingly ordered that Defendants Motion for New Trial be and it is here by overruled and denied.

SIGNED AND ENTERED this 11 day of Sept., 1989.

/S/

HONORABLE CAROLYN SPEARS
JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

/S/
ROBERT J. MYERS
State Bar No.
14765380
WILLIS, HICKEY, HOUGHAM
& MYERS
7800 IH 10 West,
Suite 600
San Antonio, Texas 78230
1-512-340-6984
ATTORNEYS FOR
PLAINTIFFS
TR210

/S/
DENNIS K. DRAKE
State Bar No.
06105000
7800 IH 10 West
Suite 235
San Antonio, TX
78230
1-512-366-9636

ATTORNEY FOR
DEFENDANTS

No. 04-89-005430-CV

IN THE FOURTH COURT OF APPEALS

AT SAN ANTONIO

THE BEXAR COUNTY APPRAISAL DISTRICT

AND

THE BEXAR COUNTY APPRAISAL REVIEW BOARD

Appellants

FIRST BAPTIST CHURCH OF SAN ANTONIO

and

VALERO REALTY COMPANY

Appellees

BRIEF OF APPELLANTS

RECEIVED AND FILED: January 29, 1990
Herb Schaefer, Clerk

TO THE HONORABLE COURT OF APPEALS:

Appellants, THE BEXAR COUNTY APPRAISAL DISTRICT and THE BEXAR COUNTY APPRAISAL REVIEW BOARD (collectively, "The District") respectfully submit their Brief to this Honorable Court of Appeals.

(pp.1, 38-40)

FOURTH POINT OF ERROR: THE TRIAL COURT ERRED IN GRANTING JUDGMENT FOR THE CHURCH/VALERO BECAUSE, AS A MATTER OF LAW, THE GRANTING OF AN EXEMPTION IN THIS CASE VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION SIX AND ARTICLE EIGHT, SECTION TWO OF THE TEXAS CONSTITUTION.

A. An Exemption In This Case Fails To Meet The "Overarching Secular Purpose" Test.

The First Amendment to the United States Constitution Provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

and

> *Article One. Section Six. Texas Constitution: All men have a natural and indefeasible right to worship Almighty God according the dictates of their consciences. No man shall be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience and matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. That it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.* (Emphasis supplied)

The United States Supreme Court, in a case involving a state sales tax, struck down as unconstitutional a tax exemption which was allowed by Texas law to religious publications where the same exemption was not allowed to non-religious publications: The test was enunciated in **Texas Monthly, Inc. v. Bullock**, 109 8.Ct. 890 (1989) @ p. 899:

> What is crucial is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for non-religious.

The United States Supreme Court again affirmed this principal in **Jimmy Swaggert Ministries v. Board of Equalization of California**, --- S.Ct. --- (1990).

The testimony of the Chief Appraiser of the Bexar Appraisal District, Mr. Walter Stoneham, establishes that in all of the Bexar Appraisal District, there are **only four other churches that are in a similar position or circumstances to rent out their parking lots**. (SF VII, pp. 873-877). Therefore, out of all of the religious properties located in Bexar County, the First Baptist Church of San Antonio is only one of five which would benefit from this exemption. In effect, this results not only in an

establishment of just those religious organizations that can lease their property for commercial use, but also results in a state sponsored support or preference for a particular religious society or mode of worship; all in violation of the United States and Texas Constitutions, and in contravention of the Supreme Court's ruling in **Texas Monthly**.

For the reasons set forth below, the granting of an exemption here clearly fails to meet the "overarching secular purpose" test enunciated in **Texas Monthly** to qualify as an exemption which would pass constitutional muster.

It is uncontroverted that the Church rents parking lots for commercial purposes. (SF IX, PX 1 and 2.) There is therefore a secular use question which must be addressed in deciding the Church's qualification for an exemption; Property Tax Code 11.20(d). Neither the Property Tax Code nor any other law in the State of Texas exempts an owner/operator of a commercial parking lot from payment of property taxes.

Furthermore, if this property was owned by Valero or by a parking lot business, and then leased to First Baptist Church, no exemption would be allowed. By the mere good fortune of leasing parking spaces from a Church, as opposed to a private, for profit business, Valero, not the Church, will save substantial sums in reduced property taxes if the lots are exempted from the payment of taxes. (See SF IX, PX 1 and 2, paragraph 8.)

If tax exemption legislation benefit only a select few is unconstitutional (as in **Texas Monthly**), then a judge's or jury's ruling should not be allowed to accomplish that which the United States Supreme Court says legislation cannot do. Here, the subsidy and concomitant unconstitutional application comes in the form of a judgment. (TR 198-202.)

. . .

Respectfully submitted,
LAW OFFICES OF DENNIS K. DRAKE
Lincoln Center, Suite 235
7800 IH 10 West
San Antonio, Texas 78230
(512) 366-8636
By: /S/
DENNIS K. DRAKE
State Bar No. 06105000
ATTORNEYS FOR APPELLANTS

NO. 86-CI-20348

FIRST BAPTIST CHURCH OF SAN ANTONIO
AND VALERO REALTY COMPANY
VS.
BEXAR APPRAISAL DISTRICT AND
BEXAR APPRAISAL REVIEW BOARD
224TH JUDICIAL DISTRICT
STATEMENT OF FACTS
TRIAL ON THE MERITS (CONTINUED)
VOLUME VII OF 9 VOLUMES
MAY 26, 1989

APPEARANCES:

PRESIDING: HONORABLE CAROLYN H. SPEARS
Judge, 224th District Court
Bexar County Courthouse
San Antonio, Texas 78205

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--*-*-*-*-*-*-*-*-*-*-*-*-*

MARY ORALIA BERRY, CSR, RPR
OFFICIAL COURT REPORTER
224TH DISTRICT COURT
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205

. . .

DIRECT EXAMINATION (Continued)

BY MR. DRAKE: Now, by "similar churches," Mr. Stoneham, describe to the jury -- does that deal with location, or does it deal with the way the property is treated regarding an exemption?

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MR. STONEHAM: Only with the way the property is treated regarding the exemption, not -- it deals with location to the extent that it has to be within the Bexar Appraisal District for me to decide on it. But anywhere within the Bexar Appraisal District, if any church leases property for secular purposes, then I have to deny the exemption.

MR. DRAKE: All right. And so, when we're talking about similar properties regarding an exemption, similar church properties, Mr. Stoneham, the churches you just mentioned, did that deal with leasing out parking lots?

MR. STONEHAM: In these five cases, it dealt with leasing parking lots, yes.

MR. DRAKE: All right. And Mr. Kilgarlin asked you, I believe, about the location of one that was near the Express News?

MR. STONEHAM: Yes.

MR. DRAKE: And does that -- what church is that?

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MR. STONEHAM: I believe Grace Lutheran is near the Express News, and I believe First Presbyterian is near the Express News.

MR. DRAKE: And that church, Grace Lutheran, does it lease its property or its parking lot out?

MR. STONEHAM To the best of my knowledge, it leases its parking lot to the Express News for employee parking at the Express News.

. . .

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U.S.C.A. Const. Amend. I

AMENDMENT I--FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.C.A. Const. Amend. XIV. §1

AMENDMENT XIV--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny any person within its jurisdiction the equal protection of the laws;

Tex. Tax Code Ann. §6.01 (Vernon 1992). Appraisal Districts Established.

(a) An appraisal district is established in each county.

(b) The district is responsible for appraising property in the district for ad valorem tax purposes of each taxing unit that imposes ad valorem taxes on property in the district.

(c) An appraisal district is a political subdivision of the state.

. . .

Tex. Tax Code Ann. §11.11 (Vernon 1992). Public Property.

(a) Except as provided by Subsections (b) and (c) of this section, property owned by this state or a political subdivision of this state is exempt from taxation if the property is used for public purposes.

. . .

(d) Property owned by the state that is not used for public purposes is taxable. Property owned by a state agency or institution is not used for public purposes if the property is rented or leased for compensation to a private business enterprise to be used by it for a purpose not related to the performance of the duties and functions of the state agency or institution or used to provide private residential housing for compensation to members of the public other than students and employees of the state agency or institution owning the property, unless the residential use is secondary to its use by an educational institution primarily for instructional purposes. Any notice required by Section 25.19 of this code shall be sent to the agency or institution that owns the property, and it shall appear in behalf of the state in any protest or appeal related to taxation of the property.

. . .

(f) Property of a higher education development foundation or an alumni association that is located on land owned by the state for the support, maintenance, or benefit of an institution of higher education as defined in Chapter 61, Education Code, is exempt

from taxation if:

(1) the foundation or organization meets the requirements of Sections 11.18(e) and (f) and is organized exclusively to operate programs or perform other activities for the benefit of institutions of higher education; and

(2) the property is used exclusively in those programs or activities.

. . .

Tex. Tax Code Ann. §11.18(a)-(b) (Vernon 1992). Charitable Organizations.

(a) An organization that qualifies as a charitable organization as provided by this section is entitled to an exemption from taxation of the buildings and tangible personal property that:

(1) are owned by the charitable organization; and

(2) except as permitted by Subsection (b) of this section, are used exclusively by qualified charitable organizations.

(b) Use of exempt property by persons who are not charitable organizations qualified as provided by this section does not result in the loss of an exemption authorized by this section if the use is incidental to use by qualified charitable organizations and limited to activities that benefit the beneficiaries of the charitable organizations that own or use the property.

. . .

Tex. Tax Code Ann. §11.181 (Vernon Supp. 1994). Charitable Organizations Improving Property for Low-Income Housing.

(a) An organization is entitled to an exemption from taxation of improved or unimproved real property it owns if the organization:

(1) meets the requirements of a charitable organization provided by Sections 11.18(e) and (f);

(2) owns the property for the purpose of building or repairing housing on the property primarily with volunteer labor to sell without profit to an individual or family satisfying the organization's low-income and other

eligibility requirements; and

(3) engages exclusively in the building, repair, and sale of housing as described by Subdivision (2), and related activities.

. . .

(c) An organization entitled to an exemption under Subsection (a) is also entitled to an exemption from taxation of any building or tangible personal property the organization owns and uses in the administration of its acquisition, building, repair, or sale of property. To qualify for an exemption under this subsection, property must be used exclusively by the charitable organization, except that another individual or organization may use the property for activities incidental to the charitable organizations use that benefit the beneficiaries of the charitable organization.

. . .

Tex. Tax Code Ann. §11.19 (Vernon 1992). Youth Spiritual, Mental, and Physical Development Associations.

(a) An association that qualifies as a youth development association as provided by Subsection (d) of this section is entitled to an exemption from taxation of the tangible property that:

(1) is owned by the association;

(2) except as permitted by Subsection (b) of this section, is used exclusively by qualified youth development associations; and

(3) is reasonably necessary for the operation of the association.

(b) Use of exempt tangible property by persons who are not youth development associations qualified as provided by Subsection (d) of this section does not result in the loss of an exemption under this section if the use is incidental to use by qualified associations and benefits the individuals the associations serve.

. . .

Tex. Tax Code Ann. §11.20 (Vernon 1992). Religious Organizations.

(a) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of:

(1) the real property that is owned by the religious organization, is used primarily as a place of regular religious worship, and is reasonably necessary for engaging in religious worship;

(2) the tangible personal property that is owned by the religious organization and is reasonably necessary for engaging in worship at the place of worship specified in Subdivision (1) of this subsection;

(3) the real property that is owned by the religious organization and is reasonably necessary for use as a residence (but not more than one acre of land for each residence) if the property:

(A) is used exclusively as a residence for those individuals whose principal occupation is to serve in the clergy of the religious organization; and

(B) produces no revenue for the religious organization;

(4) the tangible personal property that is owned by the religious organization and is reasonably necessary for use of the residence specified by Subdivision (3) of this subsection; and

(5) the real property owned by the religious organization consisting of:

(A) an incomplete improvement that is under active construction or other physical preparation and that is designed and intended to be used by the religious organization as a place of regular religious worship when complete; and

(B) the land on which the incomplete improvement is

located that will be reasonably necessary for the religious organization's use of the improvement as a place of regular religious worship.

(b) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of those endowment funds the organization owns that are used exclusively for the support of the religious organization and are invested exclusively in bonds, mortgages, or property purchased at a foreclosure sale for the purpose of satisfying or protecting the bonds or mortgages. However, foreclosure-sale property that is held by an endowment fund for longer than the two-year period immediately following purchase at the foreclosure sale is not exempt from taxation.

(c) To qualify as a religious organization for the purposes of this section, an organization (whether operated by an individual, as a corporation, or as an association) must:

(1) be organized and operated primarily for the purpose of engaging in religious worship or promoting the spiritual development or well-being of individuals;

(2) be operated in a way that does not result in accrual of distributable profits, realization of private gain resulting from payment of compensation in excess of a reasonable allowance for salary or other compensation for services rendered, or realization of any other form of private gain; and

(3) by charter, bylaw, or other regulation adopted by the organization to govern its affairs:

(A) pledge its assets for use in performing the organizati

on's religious functions; and

(B) direct that on discontinuance of the organization by dissolution or otherwise the assets are to be transferred to this state or to a charitable, educational, religious, or other similar organization

that is qualified as a charitable organization under Section 501(c)(3), Internal Revenue Code of 1954, as amended. (footnote omitted)

(d) Use of property that qualifies for the exemption prescribed by Subdivision (1) or (2) of Subsection (a) of this section for occasional secular purposes other than religious worship does not result in loss of the exemption if the primary use of the property is for religious worship and all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship.

(e) For the purposes of this section, "religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage, and commitment in behalf of a religious faith.

(f) A property may not be exempted under Subsection (a)(5) of this section for more than two years.

. . .

Tex. Tax Code Ann. §11.21 (Vernon 1992). Schools.

(a) A person is entitled to an exemption from taxation of the buildings and tangible personal property that he owns and that are used for a school that is qualified as provided by Subsection (d) of this section if:

(1) the school is operated exclusively by the person owning the property;

(2) except as permitted by Subsection (b) of this section, the buildings and tangible personal property are used exclusively for educational functions; and

(3) the buildings and tangible personal property are reasonably necessary for the operation of the school.

(b) Use of exempt tangible property for functions other than educational functions does not result in loss of an exemption authorized by this section if those other functions are incidental to

use of the property for educational functions and benefit the students or faculty of the school.

. . .

Tex. Tax Code Ann. § 11.45 (Vernon 1992). Action on Exemption Applications.

(a) The chief appraiser shall determine separately each applicant's right to an exemption. After considering the application and all relevant information, the chief appraiser shall, as the law and facts warrant:

(1) approve the application and allow the exemption;

(2) modify the exemption applied for and allow the exemption as modified;

(3) disapprove the application and request additional information from the applicant in support of the claim; or

(4) deny the application.

. . .

Tex. Tax Code Ann. § 42.21 (Vernon 1992). Petition for Review.

(a) A party who appeals as provided by this chapter must file a petition for review with the district court within 45 days after the party received notice that a final order has been entered from which an appeal may be had. Failure to timely file a petition bars any appeal under this chapter.

. . .

Tex. Tax Code Ann. §42.23 (Vernon 1992). Scope of Review.

(a) Review is by trial de novo. The district court shall try all issues of fact and law raised by the pleadings in the manner applicable to civil suits generally.

(b) The court may not admit in evidence the fact of prior action by the appraisal review board or comptroller, except to the extent necessary to establish its jurisdiction.

(c) Any party is entitled to trial by jury on demand.

(3)

No. 93-1206

FEB 10 1994
CLERK

In The

Supreme Court of the United States

October Term, 1993

BEXAR COUNTY APPRAISAL REVIEW BOARD and BEXAR COUNTY APPRAISAL DISTRICT,

Petitioners,

vs.

FIRST BAPTIST CHURCH OF SAN ANTONIO and VALERO REALTY COMPANY,

Respondents.

On Petition for Writ of Certiorari to the Fourth Court of Appeals District of Texas, San Antonio

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

For the reasons set forth hereafter, Respondents would advance that no question within the jurisdiction of this Court to decide has been properly presented by one with standing to do so. However, even if Petitioners overcome the jurisdictional and standing infirmities in their case, the questions presented are not appropriatedly framed in that:

(1) As to Petitioners' question one, there is no legal or factual basis for the allegation that religious organizations are more favorably treated than similiarly qualified secular organizations under Texas' property tax exemption scheme;

(2) As to Petitioners' question two, there is no legal or factual basis for the allegation that the state is required to subjectively determine, on a case by case basis, whether property owned by a religious organization is used primarily for religious worship under Texas' judicial application of Texas' propery tax exemption laws.

(3) As to Petitioners' question three, there is no legal or factual basis for the allegation that the church in this case uses the subject property for commercial profit-making purposes.

LIST OF ALL PARTIES

Petitioners:

A. Bexar County Appraisal Review Board (a political subdivision of the State of Texas);

B. Bexar County Appraisal District (Walter Stoneham, Chief Appraiser), a political subdivision of the State of Texas.

Respondents:

A. First Baptist Church of San Antonio, a non-profit religious organization;

B. Valero Realty Company, a Delaware corporation; a wholly owned subsidiary of Valero Energy Corporation, a Delaware corporation.

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OPINIONS BELOW

Petitioners have correctly stated the citations of the opinions and judgments delivered in the courts below.

STATEMENT OF JURISDICTION

Petitioners seek to invoke the jurisdiction of the Court pursuant to 28 U.S.C. § 1257. The Court's jurisdiction on this basis is suspect because Petitioners, in order to avail themselves of the privilege of seeking a writ from this Court must have standing to claim that the statute which they seek to have declared invalid is "repugnant to the Constitution . . ." Petitioners, in their framing of the questions presented for review; their statement of jurisdiction, their statement of the case, and their statements with reference to reasons for granting the writ set up an equal protection argument under the Fourteenth Amendment. Petitioners, as political subdivisions of the state of Texas, are without standing to raise an equal protection challenge to a statute of the state which created the political subdivisions. As Petitioners do not have privileges or immunities under the federal Constitution which they may invoke in opposition to the will of the state which created them, and are thus without standing, no federal question is presented for this Court's review under 28 U.S.C. § 1257.

Petitioners do accurately set forth the time factors relative to their filing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

Petitioners correctly quote the Fourteenth Amendment, and § 11.20, Texas Property Tax Code. Other statutes which the case involves are the other 30 exemption provisions set forth in Chapter 11 of the Texas Property Tax Code, the full text of which is printed in theAppendix pages 1a through 43a, and the following provisions of the Texas Property Tax Code, which provide in relevant part:

> Section 23.13. Taxable Leaseholds.
>
> A taxable leasehold or other possessory interest in real property that is exempt from taxation to the owner of the estate or interest incumbered by the possessory interest is appraised at the market value of the leasehold or other possessory interest. However, the appraised value may not be less than the total rental paid for the interest for the current tax year,

Section 25.07., Texas Property Tax Code provides, in relevant part:

> (a) except as provided in sub §(b) of this section, a leasehold or other possessory interest in real property that is exempt from taxation to the owner of the estate or interest incumbered by the possessory interest shall be listed in the name of the owner of the possessory interest if the duration of the interest may be at least one year.

The full text of each of the cited statutory provisions are reprinted at Appendix pages 1a through 43a to the extent that they have not been printed in Petitioners' Petition.

STATEMENT OF THE CASE

The Church's two primary parking lots, located adjacent to the Church in downtown San Antonio, Texas are the subject of a lease agreement with Valero Realty Company for a ten year term beginning in 1980. Valero pays the Church $275 per year per parking space for the right of access to the lots during normal business hours on working days. The Church reserves 40 of the spaces for a full time use to the exclusion of Valero. The Church has exclusive possession of the lots at all other times.

The Church does not make a "profit" from the arrangement with Valero. Rather, all income is devoted to the upkeep and maintenance of the Church complex as a whole. Valero makes no "profit" by virtue of its arrangement with the Church. Valero does not sublease the property, or use it for any purpose other than as a place for Valero employees to park during normal business hours. The lots are necessary for the Church to function. They are the primary parking lots utilized by the Church's congregation for worship services on Sundays, Wednesdays, Revivals, Vacation Bible School, and the like. The Church first applied for an exemption on the property with the Bexar Appraisal District in 1984. The exemption was denied, the denial was affirmed by the Appraisal Review Board, and the suit below commenced. Tax years 1985 and 1986 were added to the 1984 suit following the same result in each of the successive years. In each year, the Church was required to pay to the various taxing units served by the Appraisal District, the taxes assessed by the taxing units, in the absence of an exemption, in order to maintain its suit as required by Texas property tax law. Petitioners correctly set forth the result in the trial court favorable to the Church, and the subsequent disposition of the various appeals.

Petitioners raised their "unconstitutional as applied" arguments in the trial court in a timely fashion; Respondents interposed their standing argument. Petitioners made it clear as is demonstrated by the appendices to Petitioners' brief that Petitioners were not then challenging the constitutionality of § 11.20 or for that matter, the constitutionality of any provision of Chapter 11, Texas Property Tax Code. Petitioners' Petition for Writ of Certiorari pages 67a through 68a. Petitioners did not then, nor did they in connection with their petition in this Court, notify the Attorney General of the State of Texas of their challenge to the constitutionality of a state statute as they are required to do under Texas law in order to properly challenge the statute. Indeed, Petitioners carefully crafted their arguments in the courts below to assert an "unconstitutional as applied" argument as opposed to a direct challenge to the statute. Petitioners never filed an Application for Declaratory Relief with reference to the constitutionality of the statute in the court below. It would appear from Petitioners' Petition here that Petitioners are, for the first time, directly challenging the constitutionality of the statute, and the statutory scheme on its face.

REASONS FOR DENYING THE WRIT

Petitioners do not, as political subdivisions of this state, have standing to bring a challenge to a state statute on equal protection or due process grounds.

Petitioners concede that they are political subdivisions of the state of Texas. Petitioners' Petition pages 1 and 2. Petitioners seek to have this Court declare as unconstitutional Texas' property tax scheme relative to the granting of an exemption to qualified Church real property on equal protection grounds. Petitioners advance that Texas' scheme favors religion, to the exclusion of secular organizations, and that it is not equal or uniform in its applications or results. Petitioners invoke the Fourteenth

Amendment of the United States Constitution as their vehicle for bringing this equal protection challenge. Petitioners are unable, as a matter of law, to "invoke the protection of the Fourteenth Amendment" against its own state. *City of Newark v. New Jersey* 262 U.S. 192, 196, 43 S. Ct. 539, 540, 67 L. Ed. 943 (1923); *Williams v. Mayor and City Council of Baltimore,* 298 U.S. 36, 40, 53, S. Ct. 431, 432, 77 L. Ed. 1015 (1933); *City of Trenton v. State of New Jersey,* 262 U.S. 182, 185, 43 S. Ct. 534, 536, 67 L. Ed. 937 (1923); *see also, South Macomb Disposal Authority v. Township, of Washington,* 790 F.2d 500, 505 (6th Cir. 1986). The Petitioners, as political subdivisions of this state, have no protected rights granted them by the Fourteenth Amendment and are not "persons" within the meaning of the Fourteenth Amendment. *See id.* If further argument be needed, the Bexar Appraisal District is not another disaffected taxpayer as was the case in *Walz v. Tax Commission,* 397 U.S. 664 (1970) nor was the case in *Texas Monthly, Inc. v. Bullock,* 498 U.S. 1 (1989). Bexar Appraisal District, by statute, has no interest in the raising of tax revenues, but rather is charged with appraising taxable property for the benefit of the taxing units which it serves. Texas Property Tax Code § 6.01. *See also, Charles Schriener Bank of Kerrville, et al. v. Kerrville I.S.D., et al.,* 683 S.W. 2d 466 (Tex. App.-San Antonio 1984). Thus, even if arguably the Bexar Appraisal District had some "interest" in the result of the denial or granting of an exemption from taxation of Church-owned property, it cannot be on the basis of an interest in the generation of tax revenue. Indeed, the granting or denial of an exemption for the Church does not affect the Appraisal District monetarily in any fashion. As a political subdivision of this state, the Appraisal District and its property is exempt from property taxation, as is the Church. Texas Property Tax Code, § 11.11.

The proper course for Petitioners to have taken, if they seriously believed that Texas' property tax scheme was constitutionally infirm, would have been to have brought such action under Texas Civil Practices and Remedies Code, § 37.001 *et seq.* (Uniform Declaratory Judgments Act), after proper notice to

the state's attorney general, with a right to resort to appeal in the state system as provided by state law. Relevant portions of the Act are reproduced at Appendix B, pp. 44a-45a. Petitioners took no such tact in the case below. Rather, Petitioners told the state trial court repeatedly that they were not challenging the constitutionality of the Texas property tax scheme. Petitioners' Petition pages 67a through 68a. One must surmise that they took this position in order to avoid the requirement of filing a suit for declaratory relief and joining the state attorney general. Having exhausted all state court appeals, Petitioners now come to this Court and for the first time directly challenge the validity of Texas' property tax scheme facially on Fourteenth Amendment grounds. Yet they still have not notified the state attorney general of the existence of the lawsuit in the state court much less the existence of their petition for writ in this Court. As they did not raise a direct constitutional challenge to the validity of the statutes on their face in the courts below, they cannot raise them here for the first time. In any event, for the reasons stated, and based on the authorities above cited, Petitioners are without standing to bring such a challenge to a statute promulgated by the very state which created them.

I.

THE STATE COURT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT OR OF THE UNITED STATES COURT OF APPEALS.

Notwithstanding Respondents' challenge to Petitioners' standing in the courts below, the "Court of Last Resort" specifically addressed the Petitioners' "unconstitutional as applied" argument relative to the application of the Texas property tax scheme to the circumstances of this case. *Bexar Appraisal Review Board et al. v. First Baptist Church et al.*, 846 S.W. 2d 554,

559 (Tex. App.-San Antonio 1993, writ denied). The state court looked to, for guidance, this Court's opinion in *Walz v. Tax Commission*, 397 U.S. 664, 90 S. Ct. 1409 (1970) and found the facts and circumstances of this case to be consistent with the analysis by this Court in *Walz*. Respondents have found no reported case involving a federal question which is at odds with the analysis of the Texas Court of Appeals in this case. *See, e.g., Town of Hardenburgh, Ulster County, et al. v. State of New York, et al.*, 439 N.Y. 2d 303, 52 N.Y. 2d 536, 421 N.E. 2d 795 (1981) (religious real property exemption is constitutional; political subdivisions had no standing to challenge validity of state exemption statute as against a state on constitutional grounds); *Indian Hills Community Church v. County Board of Equalization of Lancaster County, et al. v. County Board of Equalization of Lancaster County, et al.*, 412 N.W. 2d 459, 226 Neb. 510 (S. Ct. Neb. 1987) (the First Amendment does not prohibit state's requirements that religious organizations comply with state statutes which reasonably prescribe bases or procedures to obtain exemption from state taxation) (no "excessive entanglement"); *Central Baptist Church of Miami, Florida Inc. v. Dade County, Florida, et al.*, 216 So. 2d 4 (S. Ct. Fla. 1968) (part-time rental of portion of Church parking lot for commercial parking during week day business hours does not eliminate tax exemption under Florida law); *Diffenderfer v. Central Baptist Church of Miami, Florida, et al.*, 316 F. Supp. 1116 (S.D. Fla. 1970), *appeal vacated*, 404 U.S. 412, 92 S. Ct. 574, 30 L. Ed. 567 (1972) (state tax exemption scheme which extends exemption to Church parking lot leased part-time to commercial enterprise does not violate the First Amendment).

The last cited case relied principally on this Court's prior holding in *Walz v. Tax Commission, supra.* As such, the decision of the Texas court of last resort is in accord with the decision of other courts of last resorts in other states; the decisions of United States Courts of Appeals and, indeed, with the holdings of this Court.

II.

NO EXCESSIVE ENTANGLEMENT.

Texas' property tax scheme relating to religious real property exemptions requires only that:

1. the property be owned by a religious organization;

2. the property be used primarily as a place of regular religious worship; and

3. the property be reasonably necessary for engaging in religious worship.

"Religious worship" is broadly defined at subsection (e) of § 11.20:

> "Religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage, and commitment on behalf of a religious faith.

Further, the qualifications of a group as a religious organization is broadly defined at subsection (c) of § 11.20 (*see* Appendix pages 12-14).

The question of whether the First Baptist Church of San Antonio was a religious organization, or what its motives or intents were or are was never an issue in this case. Further, once the exemption is granted, it need not be reapplied for in subsequent years. Section 11.43(c), Texas Property Tax Code. In other words, the religious organization must only meet the requirements of § 11.20 to the satisfaction of the chief appraiser in order to qualify for the exemption and the Church is not thereafter required to apply

for an exemption in subsequent years so long as the circumstances giving rise to the initial exemption have not changed. True, the exemption is not "self-executing," but the requirements of the state of Texas relating to an exemption from taxation of religious real property are not so burdensome as to create an excessive entanglement between the Church and state. Indeed, as the Nebraska Supreme Court observed in *Indian Hills Community Church v. The County Board of Equalization of Lancaster County, supra,* (412 N.W. 2d 459, 463): "nothing in *Walz* supports a premise or conclusion that the First Amendment to the United States Constitution prohibits a State's requirement that a religious organization must comply with a state's statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation."

III.

THE TEXAS STATUTE DOES NOT FAVOR RELIGIOUS ORGANIZATIONS OVER SECULAR ORGANIZATIONS.

At Chapter 11 of the Texas Property Tax Code (subtitle C, Chapter 11, Texas Property Tax Code): "Taxable Property and Exemptions," some 30 classes or categories of property are entitled to an exemption from taxation by the state, vis:

Section 11.02. (Intangible Personal Property exempt) (self-executing).

Section 11.11. (Public property owned by state or political subdivision of the state exempt) (self-executing).[1]

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1. Although exclusive public use is required by the statute, Texas' attorney general has consistently concluded that such public property, leased to private individuals is exempt if the income is properly used. Op. Tex. Att. Gen. JM 405 (1985); Op. Tex. Att. Gen. JM-1049 (1989).

Section 11.12. (Property exempt by federal law is exempt) (self-executing).

Section 11.13 (Partial exemption for residence homesteads) (application and qualification required).

Section 11.14. (Tangible Personal Property Not Producing Income exempt) (self-executing).

Section 11.15. (Family Supplies for home or farm use exempt) (self-executing).

Section 11.16. (Farm Products exempt) (self-executing).

Section 11.161. (Implements of Farming or Ranching exempt) (self-executing).

Section 11.17. (Not-for-profit cemetery is exempt) (application required).

Section 11.18. (Charitable Organizations; land, buildings, and tangible personal property of qualified charitable organizations exempt) (application required) (exclusive use required, provided that incidental use which is beneficial to the charitable organization does not destroy exemption).

Section 11.19. (Youth, Spiritual, Mental and Physical Development Associations) (tangible property owned by the association and used exclusively by the association is exempt from taxation provided that incidental use by others of the property beneficial to the associations does not destroy exemption) (application required).

Section 11.20. (Religious Organizations) (real property owned by the organization, used primarily as a place of regular

religious worship, and reasonably necessary for engaging in religious worship is exempt from taxation provided that occasional secular use of the property by others does not destroy exemption so long as income from the other use is properly used by the organization) (application required).

Section 11.21. (Schools) (tangible property of schools exempt if used in the school and if operated exclusively by the person owning the property provided that incidental use of the property which benefits the students or faculty of the school does not destroy the exemption) (application required).

Section 11.22. (Disabled Veterans) (partial exemption on certain real property for disabled veterans) (application required).

Section 11.23. (Miscellaneous Exemptions).

A. Veteran's Organizations (exemption from taxation for real property owned by the Veteran's organizations which is primarily used by the organization, and is reasonably necessary for the use of the organization provided that occasional renting of the property does not destroy the exemption if the proceeds from the rental are properly used) (application required).

B. Federation of Women's Clubs (tangible property exempt from taxation) (application required) (no "exclusive use" required).

C. Nature Conservancy of Texas (tangible property exempt) (application required) (no requirement of exclusive use).

D. Congress of Parents and Teachers (tangible property including land that is reasonably necessary for the use of, access to, or ornamentation of the buildings, owned by the Congress and used as its state headquarters is exempt).

E. Private Enterprise Demonstration Associations (tangible property owned and used exclusively and reasonably necessary for the association's operation is exempt) (application required).

F. Buffalo and Cattalo (Buffalo and Cattalo, not held for gain and used in experimental breeding with cattle exempt).

G. Theater Schools (qualified nonprofit corporations entitled to an exemption from taxation of the property it owns and uses in the operation of the school; no exclusive use required; application required).

I. Community Service Clubs (qualified non profit community service clubs entitled to exemption from taxation on property that it owns which is not held for gain; no exclusive use required; application required).

J. Medical Center Development (real and personal property owned by qualified nonprofit corporation and held for use in the development of the Medical Center area or areas exempt; application required).

K. Scientific Research Corporations (qualified nonprofit corporations entitled to exemption from taxation of property it owns and uses in scientific research and education; non-scientific research and education use does not destroy exemption if other functions are incidental to use of property for scientific research and education activities and benefit the non-profit corporation or the colleges and universities they support) (application required).

Section 11.24. (Historic Sites) (qualified historical sites, as well as the structure and the land necessary for access to and use of the structure exempt from taxation in whole or in part).

Section 11.25.1. (Tangible Personal property exempt; certain

"freeport goods" and goods in interstate commerce exempt under certain circumstances) (application required).

Section 11.27. (Solar and Wind-Powered Energy Devices used primarily for the production and distribution of energy for on site use exempt from taxation; application required).

Section. 11.27 1. (Offshore Drilling Equipment Not in Use is entitled to exemption from taxation).

Section 11.29. (Intracoastal Waterway Dredge Disposal Sites dedicated by recorded donated easement exempt from taxation).

Section 11.30. (Nonprofit Water Supply and Wastewater Service Corporations); (tangible property owned by the corporation and reasonably necessary for and used in the operation of the corporation exempt from taxation).

As is obvious from the foregoing, Texas' property tax exemption scheme is reasonable and even-handed as it relates to the diverse groups, organizations, and individuals, including religious organizations which are entitled to an exemption from taxation within certain criteria as prescribed by the Legislature. Granted each exemption provided for in Chapter 11 is not exactly the same. The provisions, however, are so reasonably similar that no intent to either advance or inhibit religious organizations as compared to the other broad based non-sectarian groups afforded exemptions under Chapter 11 is evidenced.

IV.

NO "STATE SUBSIDY" IS CREATED.

The commercial use of exempt property is taxable in Texas generally, and this property in particular. Section 23.13, Property

Tax Code (Taxable Leaseholds). Petitioners fail to point out to the Court that the Texas Legislature in enacting § 23.13 has recognized the practical realities within a modern, urban society. Private individuals and companies often compete with organizations entitled to an exemption for ownership and/or use of real property especially in congested downtown areas. Quite unlike the New York scheme approved by this Court in *Walz,* and indeed quite unlike the Florida scheme approved by the Federal District Court in Florida in *Diffenderfer,* Texas has specifically provided for the taxation of the commercial use of property which is otherwise exempt to the qualifying owner of the property. Sections 23.13 and 25.07 Texas Property Tax Code provide that where a property is exempt, but is leased to another, that the property be listed on the tax rolls in the lessee's name, and the lessee's taxable leasehold interest in the exempt property be appraised and taxed at its market value. Indeed, the statute provides that the commercial use of that property will always be taxed, since at a minimum, a tax is based upon a value of the property which can never be less than the annual rental paid on the property. The Legislature has carefully balanced the state and its subdivision's need to tax commercial property against the sound public policy of exempting from taxation property owned, and used by, and reasonably necessary for use by religious, charitable, and public organizations. By providing for the taxation of the commercial use of an exempt property, the state has insured that owners of property competing in the open market with the lessees of exempt property are not disadvantaged by the lessee's "tax break" and has further insured that religious organizations, charitable organizations, and the government cannot entice private enterprise into commercial lease arrangements on the premise that as lessees, they will not be reasponsible for the payment of property taxes. The state has also reasonably required the government, charitable organizations, religious organizations, and the like, to dedicate any income which those organizations receive from the other use of their exempt property to charitable, religious, or governmental purposes or that

property loses its exemption. Texas has adopted a thoughtful, well-reasoned, and even-handed approach by providing for circumstances for qualified organizations to be entitled to an exemption from taxation of their real property, but also providing that the state will receive its tax dollars from any commercial use to which that exempt property is put. Under these circumstances, no church is favored over another church, no church is burdened where another church is not; no religious organization is favored or burdened in a manner inconsistent with the benefits and burdens placed on a broad based non-sectarian group of which religious organizations are a part. Even if Petitioners have standing to make a Fourteenth Amendment argument, the argument must fail on its merits since the state of Texas has gone out of its way to insure that religious organizations are treated no differently than other similarly situated groups.

V.

THERE IS NO ISSUE WHICH NEEDS TO BE RESOLVED BY THIS COURT.

Petitioners cite the dissent in another case, and the concurring opinion of a justice of the Texas Supreme Court in this case in support of their position that this Court should resolve uncertainties. However, there are no uncertainties in the majority opinion of the Court in the *City of Austin v. University Christian Church*, 768 S.W. 2d 718 (Tex. 1988), or this case. *First Baptist Church of San Antonio v. Bexar County Appraisal Review Board*, 833 S.W. 2d 108 (Tex. 1992). The analysis of the law by the Texas Supreme Court in each of those cases is not just consistent, it is identical. Dissents and concurring opinions are interesting, but they are not the law. The law is set forth in the majority opinions of the court and they are entirely uniform and consistent. It is true that the ultimate result in the *City of Austin* case was that the property in question was taxable. However, that case was fraught with

procedural difficulties (such as the Church's failure to exhaust its administrative remedies) which were not present in this case. Further, there were significant factual differences in the two cases. The fact remains that the jury in this case, after being properly instructed upon the law, and after having heard a week of evidence from both sides, found that the property was entitled to an exemption. The trial court ordered Valero's leasehold interest in the exempt property to be appraised and taxed. The latter circumstance was certainly not part of the case in the *City of Austin* matter.

Finally, it is disingenuous at best to suggest to the Court that because other churches in San Antonio lease their parking lots to private business but do not enjoy a property tax exemption, that this should form the basis of this Court's review of the facts and circumstances of this case by way of certiorari. As stated above, it should be one of these other churches with standing to raise the equal protection issue which brings the challenge if one is to be brought, and not the political subdivision which is presently before the Court. While is it certainly not part of this record what the circumstances of the other churches are, one must surmise that they are either not interested in seeking an exemption, or, more likely, they are awaiting the final outcome of this case before spending precious church dollars in a ten year fight with the government as First Baptist has been required to do. This issue, totally outside the record of this case, is a non-issue and should be disregarded by the Court.

CONCLUSION

The Petitioners, political subdivisions of the state, have no Fourteenth Amendment rights, or other privileges or immunities under the federal Constitution which they may invoke in opposition to the will of their creator. *Trenton v. New Jersey*, 262 U.S. 182, 433 S. Ct. 534, 67 L. Ed. 937. Petitioners show no

personal harm, for indeed there is none occasioned upon them by the results of this case. This is purely a state court matter, and it has been decided by the court of last resort in this state. None of Petitioners' complaints, even if they had standing, rise to the level of an important federal question which should be decided by this Court. No Texas decision is at odds with any decision of this Court, the Circuit Courts, or the Supreme Courts of other states. Texas' well thought out, and carefully balanced property tax exemption scheme does not favor or disfavor religious or other similarly situated secular organizations, one over the other. Texas' scheme goes even further: it provides for the taxation of any commercial use of property that is otherwise exempt.

Both procedurally, and on the merits, Petitioners' Petition for Writ of Certiorari in this Court must fail. Respondents request that the Petition be denied and dismissed by this Court, and that the State of Texas' interpretation and application of its own statutes be left to stand.

Respectfully submitted,

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APPENDIX A — CHAPTER ELEVEN OF THE TEXAS PROPERTY TAX CODE

Subchapter A. Taxable Property

Sec. 11.02. Intangible Personal Property.

(a) Except as provided by Subsection (b) of this section, Intangible personal property is not taxable.

(b) Intangible property of a transportation business listed in Subchapter A, Chapter 24 of this code, and intangible property governed by Article 4.01, Insurance Code, or by Section 11.09, Texas Savings and Loan Act, are taxable as provided by law, unless exempt by law, if this state has jurisdiction to tax those intangibles.

(c) This state has jurisdiction to tax intangible personal property if the property is:

(1) owned by a resident of this state; or

(2) located in this state for business purposes.

(d) Repealed in 1984.

Sec. 11.11. Public Property.

(a) Except as provided by Subsection (b) and (c) of this section, property owned by this state or a political subdivision of this state is exempt from taxation if the property is used for public purposes.

(b) Land owned by the Permanent University Fund is taxable for county purposes. Any notice required by

Section 25.19 of this code shall be sent to the comptroller, and the comptroller shall appear in behalf of the state in any protest or appeal relating to taxation of Permanent University Fund land.

(c) Agricultural or grazing land owned by a county for the benefit of public schools under Article VII, Section 6, of the Texas Constitution is taxable for all purposes. The county shall pay the taxes on the land from the revenue derived from the land. If revenue from the land is insufficient to pay the taxes, the county shall pay the balance from the county general fund.

(d) Property owned by the state that is not used for public purposes is taxable. Property owned by a state agency or institution is not used for public purposes if the property is rented or leased for compensation to a private business enterprise to be used by it for a purpose not related to the performance of the duties and functions of the state agency or institution or used to provide private residential housing for compensation to members of the public other than students and employees of the state agency or institution owning the property, unless the residential use is secondary to its use by an educational institution primarily for instructional purposes. Any notice required by Section 25.19 of this code shall be sent to the agency or institution that owns the property, and it shall appear in behalf of the state in any protest or appeal related to taxation of the property.

(e) It is provided, however, that property that is held or dedicated for the support, maintenance, or benefit of an institution of higher education as defined in Chapter 61, Texas Education Code, but is not rented or leased for

compensation to a private business enterprise to be used by it for a purpose not related to the performance of the duties and functions of the state or institution or is not rented or leased to provide private residential housing to members of the public other than students and employees of the state or institution is not taxable. All oil, gas, and other mineral interests owned by an institution of higher education are exempt from all ad valorem taxes. Property bequeathed to an institution is exempt from the assessment of ad valorem taxes from the date of the decedent' death, unless:

(1) the property is leased for compensation to a private business enterprise as provided in this subsection; or

(2) the transfer of the property to an institutions contested in a probate court. In this case, ad valorem taxes shall be assessed to the estate of the decedent until the final determination of the disposition of the property is made. The property is exempt from the assessment of ad valorem taxes upon vesting of the property in the institution.

(f) Property of a higher education development foundation or an alumni association that is located on land owned by the state of the support, maintenance, or benefit of an institution of higher education as defined in Chapter 61, Education Code, is exempt from taxation if:

(1) the foundation or organization meets the requirements of Sections 11.18(e) and (f) and is organized exclusively to operate programs or

perform other activities for the benefit of institutions of higher education; and

(2) the property is used exclusively in those programs or activities.

(g) For purposes of this section, an improvement is owned by the state and is used for public purposes if it is:

(1) located on land owned by the Texas Department of Corrections; leased and used by the department; and

(2) subject to a lease-purchase agreement providing that legal title to the improvement passes to the department at the end of the lease period.

Sec. 11.12. Federal Exemptions.

Property exempt from ad valorem taxation by federal law is exempt from taxation.

Sec. 11.13. Residence Homestead.

(a) A family or single adult is entitled to an exemption from taxation for the county purposes authorized in Article VIII, Section 1-a, of the Texas Constitution of $3,000 of the assessed value of his residence homestead.

(b) An adult is entitled to exemption from taxation by a school district of $5,000 of the appraised value of his residence homestead.

(c) In addition to the exemption provided by Subsection (b)

of this section, an adult who is disabled or is 65 or older is entitled to an exemption from taxation by a school district of $10,000 of the appraised value of his residence homestead.

(d) In addition to the exemptions provided by Subsections (b) and (c) of this section, an individual who is disabled or is 65 or older is entitled to an exemption from taxing units of a portion (the amount of which is fixed as provided by Subsection (e) of this section) of the appraised value of his residence homestead if the exemption is adopted either:

(1) by the governing body of the taxing unit other than a county education district;

(2) by a favorable vote of a majority of the qualified voters of the taxing unit at an election called by the governing body of the taxing unit other than a county education district, and the governing body shall call the election on the petition of at least 20 percent of the number of qualified voters who voted in the preceding election of the taxing unit; or

(3) by a favorable vote of a majority of the qualified voters of a county education district at an election held under Section 20.950, Education Code.

(e) The amount of an exemption adopted as provided by Subsection (d) of this section is $3,000 of the appraised value of the residence homestead unless a larger amount is specified by:

(1) the governing body authorizing the exemption if the exemption is authorized as provided by Subdivision (1) of Subsection (d) of this section;

(2) the petition for the election if the exemption is authorized as provided by Subdivision (2) of Subsection (d) of this section; or

(3) the proposition approved at an election held under Section 20.950, Education Code.

(f) Once authorized, an exemption adopted as provided by Subsection (d) of this section may be repealed or decreased or increased in amount by the governing body of the taxing unit or by the procedure authorized by Subdivision (2) of Subsection (d) of this section. In the case of a decrease, the amount of the exemption may not be reduced to less than $3,000 of the market value.

(g) If the residence homestead exemption provided by Subsection (d) of this section is adopted by a county that levies a tax for the county purposes authorized by Article VIII, Section 1-a, of the Texas Constitution, the residence homestead exemptions provided by Subsections (a) and (d) of this section may not be aggregated for the county tax purposes. An individual who is eligible for both exemptions is entitled to take only the exemption authorized as provided by Subsection (d) of this section for purposes of that county tax.

(h) Joint or community owners may not each receive the same exemption provided by or pursuant to this section

for the same residence homestead in the same year. An eligible disabled person who is 65 or older may not receive both a disabled and an elderly residence homestead exemption but may choose either.

(i) The assessor and collector for a taxing unit may disregard the exemptions authorized by Subsection (b), (c), (d), or (n) of this section and assesses and collect a tax pledged for payment of debt without deducting the amount of the exemption if:

(1) prior to adoption of the exemption, the unit pledged the taxes for the payment of a debt; and

(2) granting the exemption would impair the obligation of the contract creating the debt.

(j) For purposes of this section, "residence homestead" means a structure (including a mobile home) or a separately secured and occupied portion of a structure (together with the land, not to exceed 20 acres, and improvements used in the residential occupancy of the structure, if the structure and the land and improvements have identical ownership) that:

(1) is owned by one or more individuals;

(2) is designed or adapted for human residence;

(3) is used as a residence; and

(4) is occupied as his principal residence by an owner who qualifies for the exemption.

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(k) A qualified residential structure does not lose its character ad a residence homestead if a portion of the structure is rented to another or is used primarily for other purposes that are incompatible with the owner's residential use of the structure. However, the amount of any residence homestead exemption does not apply to the value of that portion of the structure that is used primarily for purposes that are incompatible with the owner's residential use.

(l) A qualified residential structure does not lose its character as a residence homestead when the owner who qualifies for the exemption temporarily stops occupying it as a principal residence if that owner does not establish a different principal residence and intends to return and occupy the structure as his principal residence.

(m) In this section:

(1) "Disabled" means under a disability for purposes of payment of disability insurance benefits under Federal Old-Age, Survivors, and Disability Insurance.

(2) "School district" means a political subdivision organized to provide general elementary and secondary public education. "School district" includes a county education district established by the consolidation of the local school districts in its boundaries for the limited purpose of exercising a portion of the taxing power previously authorized by the voters In those school districts. "School district" does not include a junior college district or

a political subdivision organized to provide special education services.

(n) In addition to any other exemptions provided by this section, an individual is entitled to an exemption from taxation by a taxing unit other than a county education district of a percentage of the appraised value of his residence homestead if the exemption is adopted by the governing body of the taxing unit before May 1 in the manner provided by law for official action by the body. If the percentage set by the taxing unit produces an exemption in a tax year of less than $5,000 when applied to a particular residence homestead, the individual is entitled to an exemption of $5,000 of the appraised value. The percentage adopted by the taxing unit may not exceed 20 percent. In addition to any other exemptions provided by this section, an individual is entitled to an exemption from taxation by a county education district of a percentage of the appraised value of his residence homestead if the exemption is adopted by the voters of the district at an election held in the district for that purpose under Section 20.496, Education Code. If the percentage set by the voters produces an exemption in a tax year of less than $5,000 when applied to a particular residence homestead, the individual is entitled to an exemption of $5,000 of the appraised value. The percentage adopted by the voters may not exceed 20 percent.

(o) For purposes of this section, a residence homestead also may consist of an interest in real property created through ownership of stock in a corporation Incorporated under the Cooperative Association Act

(Article 1396-50.01, Vernon's Texas Civil Statutes) to provide dwelling places to its stockholders if:

(1) the interest of the stockholders of the corporation are appraised separately as provided by Section 23.19 of this code in the tax year to which the exemption applies;

(2) ownership of the stock entitles the owner to occupy a dwelling place owned by the corporation;

(3) the dwelling place is a structure or a separately secured and occupied portion of a structure; and

(4) the dwelling place is occupied as his principal residence by a stockholder who qualifies for the exemption.

(p) Exemption under this section for a homestead described by Subsection (o) of this section extends only to the dwelling place occupied as a residence homestead and to a portion of the total common area used in the residential occupancy that is equal to the percentage of the total amount of the stock Issued by the corporation that is owned by the homestead claimant. The size of a residence homestead under Subsection (o) of this section, including any relevant portion of common area, may not exceed 20 acres.

Sec. 11.14. Tangible Personal Property Not Production Income.

(a) A person is entitled to an exemption from taxation of all tangible personal property, other than manufactured

homes, that the person owns and that is not held or used for production of income.

(b) In this section, "manufactured home" has the meaning assigned by Section 11.432 of this code.

(c) The governing body of a taxing unit, other than a county education district, by resolution or order, depending upon the method prescribed by law for official action by that governing body, may provide for taxation of tangible personal property exempted under Subsection (a). The voters of a county education district, by an election held under Section 20.951, Education Code, may provided for taxation of tangible personal property exempted under Subsection (a). If a taxing unit provides for taxation of tangible personal property as provided by this subsection, the exemption prescribed by Subsection (a) does not apply to that unit.

(d) The central appraisal district for the county shall determine the cost of appraising tangible personal property required by a taxing unit under the provisions of Subsection (c) and shall assess those costs to the taxing unit or taxing units which provide for the taxation of tangible personal property.

(e) A political subdivision other than a county education district choosing to tax property otherwise made exempt by this section, pursuant to Article VIII, Section I (e), of the Texas Constitution, may not do so until the governing body of the political subdivision has held a public hearing on the matter, after having given notice of the hearing at the times and in the manner required by

this subsection, and has found that the action will be in the public interest of all the residents of that political subdivision. At the hearing, all interested persons are entitled to speak and present evidence for or against taxing the property. Not later than the 30th day prior to the date of a hearing held under this subsection, notice of hearing must be;

(1) published in a newspaper having general circulation in the political subdivision and in a section of the newspaper other than the advertisement section;

(2) not less than one-half of one page in size; and

(3) republished on not less than three separate days during the period beginning with the 10th day prior to the heating and ending with the actual date of the hearing.

Sec. 11.15. Family Supplies.

A family is entitled to an exemption from taxation of its family supplies for home or farm use.

Sec. 11.16. Farm Products.

(a) A producer is entitled to an exemption from taxation of the farm products that he produces and owns. A nursery product, as defined by Section 71.041, Agriculture Code, is a farm product for purposes of this section if it is in a growing state.

(b) Farm products in the hands of the producer are exempt.

(c) For purposes of this exemption, the following definitions apply:

(1) "Farm products" includes livestock and poultry.

(2) "In the hands of the producer," for livestock and poultry means under the ownership of the person who is financially providing for the physical requirements of such livestock and poultry on January 1 of the tax year.

Sec. 11.17. Cemeteries.

A person is entitled to an exemption from taxation of the property he owns and uses exclusively for human burial and does not hold for profit.

Sec. 11.18. Charitable Organizations.

(a) An organization that qualifies as a charitable organization as provided by this section is entitled to an exemption from taxation of the buildings and tangible personal property that:

(1) are owned by the charitable organization; and

(2) except as permitted by Subsection (b) of this section, are used exclusively by qualified charitable organizations.

(b) Use of exempt property by persons who are not

charitable organizations qualified as provided by this section does not result in the loss of an exemption authorized by this section if the use is incidental to use by qualified charitable organizations and limited to activities that benefit the beneficiaries of the charitable organizations that own or use the property.

(c) To qualify as a charitable organization for the purposes of this section, an organization, whether operated by an individual, as a corporation, as a foundation, as a trust, or as an association, must meet the applicable requirements of Subsections (d), (e), (f), and (g) of this section.

(d) A charitable organization must be organized exclusively to perform religious, charitable, scientific, literary, or educational purposes and, except as permitted by Subsection (h) of this section, engage exclusively in performing one or more of the following charitable functions:

(1) providing medical care without regard to the beneficiaries' ability to pay;

(2) providing support or relief of orphans, delinquent, dependent, or handicapped children in need of residential care, abused or battered spouses or children in need of temporary shelter, the impoverished, or victims of natural disaster without regard to the beneficiaries; ability to pay;

(3) providing support to elderly persons or the handicapped without regard to the beneficiaries' ability to pay;

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(4) preserving a historical landmark or site;

(5) promoting or operating a museum, zoo, library, theater of the dramatic arts, or symphony orchestra or choir;

(6) promoting or providing humane treatment of animals;

(7) acquiring, storing, transporting, selling, or distributing water for public use;

(8) answering fire alarms and extinguishing fires with no compensation or only nominal compensation to the members of the organization;

(9) promoting the athletic development of boys or girls under the age of 18 years;

(10) preserving or conserving wildlife;

(11) promoting educational development through loans or scholarships to students;

(12) providing halfway house service pursuant to a certification as a halfway house by the Board of Pardons and Paroles;

(13) providing permanent housing and related social, health care, and educational facilities for persons who are 62 years of age or older without regard to the residents' ability to pay;

(14) promoting or operating an art gallery, museum, or collection, in a permanent location or on tour, that is open to the public;

(15) providing for the organized solicitation and collection for distributions through gifts, grants, and agreements to nonprofit charitable, education, religious, and youth organizations that provide direct human, health, and welfare services;

(16) performing biomedical or scientific research or biomedical or scientific education for the benefit of the public; or

(17) operating a television station that produces or broadcasts educational, cultural, or other public interest programming and that receives grants from the Corporation for Public Broadcasting under 47 U.S.C. Section 396.

(e) A charitable organization must be operated in a way that does not result in accrual of distributable profits, realization of private gain resulting from payment of compensation in excess of a reasonable allowance for salary or other compensation for services rendered, or realization of any other form of private gain and, if the organization performs one or more of the charitable functions specified by Subsection (d) of this section other than a function specified In Subdivision (1), (2), (8), (9), (12), or (16), be organized as a nonprofit corporation as defined by the Texas Non-Profit Corporation Act.

(f) A charitable organization must, by charter, bylaw, or other regulation adopted by the organization to govern its affairs:

(1) pledge its assets for use in performing the organization's charitable functions; and

(2) direct that on discontinuance of the organization by dissolution or otherwise:

(A) the assets are to be transferred to this state or to an educational, religious, charitable, or other similar organization that is qualified as a charitable organization under Section 501(c)(3), Internal Revenue Code of 1986, as amended; or

(B) if required for the organization to qualify as a tax-exempt organization under Section 501(c)(12), Internal Revenue Code of 1986, as amended, the assets are to be transferred directly to the organization's members, each of whom, by application for an acceptance of membership in the organization, has agreed to immediately transfer those assets to this state or to an educational, religious, charitable, or other similar organization that is qualified as a charitable organization under Section 501(c)(3), Internal Revenue Code of 1986, as amended, as designated in the bylaws, charter, or regulation adopted by the organization.

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(g) A charitable organization that performs a charitable function specified by Subsection (d)(15) of this section must:

(1) be affiliated with a state or national organization that authorizes, approves, or sanctions, volunteer charitable fund raising organizations;

(2) qualify for exemption under Section 501(c)(3), Internal Revenue Code of 1986, as amended;

(3) be governed by a volunteer board of directors; and

(4) distribute contributions to at least five other associations to be used for general charitable purposes, with all recipients meeting the following criteria:

(A) be governed by a volunteer board of directors;

(B) qualify for exemption under Section 501(c)(3), Internal Revenue Code of 1986, as amended;

(C) receive a majority of annual revenue from private or corporate charitable gifts and governmental agencies; and

(D) provide services without regard to the ability of persons receiving the services to pay for the services.

(h) Performance of noncharitable functions by a charitable

organization that owns or uses exempt property does not result in loss of an exemption authorized by this section if those other functions are incidental to the organization's charitable functions.

(i) In this section, "building" includes the land that is reasonably necessary for use of, access to, and ornamentation of the building.

(j) The exemption of an organization preserving or conserving wildlife is limited to land and improvements and may not exceed 1,000 acres in any one county.

Sec. 11.19. Youth Spiritual, Mental, and Physical Development.

(a) An association that qualifies as a youth development association as provided by Subsection (d) of this section is entitled to an exemption from taxation of the tangible property that:

(1) is owned by the association;

(2) except as permitted by Subsection (b) of this section, is used exclusively by qualified youth development associations; and

(3) is reasonably necessary for the operation of the association.

(b) Use of exempt tangible property by persons who are not youth development associations qualified as provided by Subsection (d) of this section does not result in the loss of an exemption under this section if the use is

incidental to use by qualified associations and benefits the individuals the associations serve.

(c) An association that qualifies as youth development associations as provided by Subsection (d) of this section is entitled to an exemption from taxation of those endowment funds the association owns that are used exclusively in bonds, mortgages, or property purchased at a foreclosure sale for the purpose of satisfying or protecting the bonds or mortgages. However, foreclosure-sale property that is held by an endowment fund for longer than the two-year period immediately following purchase at the foreclosure sale is not exempt from taxation.

(d) To qualify as a youth development association for the purposes of this section, an association must:

(1) engage primarily in promoting the threefold spiritual, mental and physical development of boys, girls, young men, or young women;

(2) be operated in a way that does not result in accrual of distributable profits, realization of private gain resulting from payment of compensation in excess of a reasonable allowance for salary or other compensation for services rendered, or realization of any other form of private gain;

(3) operate in conjunction with a state or national organization that is organized and operated for the same purpose as the association; and

(4) by charter, bylaw, or other regulation adopted by the association to govern its affairs:

(A) pledge its assets for use in performing the association's youth development functions; and

(B) direct that on discontinuance of the association by dissolution or otherwise the assets are to be transferred to this state or to a charitable, educational, religious, or other similar organization that is qualified as a charitable organization under Section 501(c)(3), Internal Revenue Code of 1954, as amended.

Sec. 11.20. Religious Organizations.

(a) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of:

(1) the real property that is owned by the religious organization, is used primarily as a place of regular religious worship, and is reasonably necessary for engaging in religious worship;

(2) the tangible personal property that is owned by the religious organization and is reasonably necessary for engaging in worship at the place of worship specified in Subdivision (1) of this subsection;

(3) the real property that is owned by the religious

organization and is reasonably necessary for use as a residence (but not more than one acre of land for each residence) if the property.

(A) is used exclusively as a residence for those individuals whose principal occupation is to service in the clergy of the religious organization; and

(B) produces no revenue for the religious organization;

(4) the tangible personal property that is owned by the religious organization and is reasonably necessary for use of the residence specified by Subdivision (3) of this subsection; and

(5) the real property owned by the religious organization consisting of:

(A) an incomplete improvement that is under active construction or other physical preparation and that is designed and intended to be used by the religious organization as a place of regular religious worship when complete; and

(B) the land on which the incomplete improvements is located that will be reasonably necessary for the religious organization's use of the improvement as a place of regular religious worship.

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(b) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of those endowment funds the organization owns that are used exclusively for the support of the religious organizations and are invested exclusively in bonds, mortgages, or property purchased at a foreclosure sale for the purpose of satisfying or protecting the bonds or mortgages. However, foreclosure-sale property that is held by an endowment fund for longer than the two-year period immediately following purchase at the foreclosure sale is not exempt from taxation.

(c) To qualify as a religious organization for the purposes of this section, an organization (whether operated by an individual, as a corporation, or as an association) must:

(1) be organized and operated primarily for the purpose of engaging in religious worship or promoting the spiritual development or well-being of individuals;

(2) be operated in a way that does not result in accrual of distributable profits, realization of private gain resulting from payment of compensation in excess of a reasonable allowance for salary or other compensation for services rendered, or realization of any other form of private gain; and

(3) by charter, bylaw, or other regulation adopted by the organization to govern its affairs:

(A) pledge its assets for use in performing the organization's religious functions; and

(B) direct that on discontinuance of the organization by dissolution or otherwise the assets are to be transferred to this state or to a charitable, educational, religious, or other similar organization that is qualified as a charitable organization under Section 501(c)(3), Internal Revenue Code of 1954, as amended.

(d) Use of property that qualifies for the exemption prescribed by Subdivision (1) or (2) of Subsection (a) of this section for occasional secular purposes other than religious worship does not result in loss of the exemption if the primary use of the property is for religious worship and all income from the other use is devoted exclusively to the maintenance and development of the property as a place of religious worship.

(e) For the purposes of this section, "religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage, and commitment in behalf of a religious faith.

(f) A property may not be exempted under Subsection (a)(5) of this section for more than two years.

Sec. 11.21. Schools.

(a) A person is entitled to an exemption from taxation of the buildings and tangible personal property that he owns and that are used for a school that is qualified as provided by Subsection (d) of this section if:

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(1) the school is operated exclusively by the person owning the property,

(2) except as permitted by Subsection (b) of this section, the buildings and tangible personal property are used exclusively for educational functions; and

(3) the buildings and tangible personal property are reasonably necessary for the operation of the school.

(b) Use of exempt tangible property for functions other than educational functions does not result in loss of an exemption authorized by this section if those other functions are incidental to use of the property for educational functions and benefit the students or faculty of the school.

(c) A person who operates a school that is qualified as provided by Subsection (d) of this section is entitled to an exemption from taxation of those endowment funds he owns that are used exclusively for the support of the school and are invested exclusively in bonds, mortgages, or property purchased at a foreclosure sale for the purpose of satisfying or protecting the bonds or mortgages. However, foreclosure-sale property that is held by an endowment fund for longer than the two-year period immediately following purchase at the foreclosure sale is not exempt from taxation.

(d) To qualify as a school for the purpose of this section, an organization (whether operated by an individual, as a corporation, or as an association) must:

(1) normally maintain a regular faculty and curriculum and normally have a regularly organized body of students in attendance at the place where its educational functions are carried on;

(2) be operated in a way that does not result in accrual of distributable profits, realization of private gain resulting from payment of compensation in excess of a reasonable allowance for salary or other compensation for services rendered, or realization of any other form of private gain, and if the organization is a corporation, be organized as a nonprofit corporation as defined by the Texas Non-Profit Corporation Act; and

(3) by charter, bylaw, or other regulation adopted by the organization to govern its affairs:

(A) pledge its assets for use in performing the organization's educational functions; and

(b) direct that on discontinuance of the organization by dissolution or otherwise the assets are to be transferred to this state or to an educational, charitable, religious, or other similar organization that is qualified as a charitable organization under Section 501(c)(3), Internal Revenue Code of 1954, as amended.

(e) In this section, "building" includes the land that is reasonably necessary for use of, access to, and ornamentation of the building.

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Sec. 11.22. Disabled Veterans.

(a) A disabled veteran is entitled to an exemption from taxation of a portion of the assessed value of a property he owns and designates as provided by Subsection (f) of this section in accordance with the following schedule:

	for a disability rating of	
an exemption of up to:	at least:	but not greater than:
$ 1, 500 of the assessed value	10%	30%
2,000	31	50
2,500	51	70
3,000	71 and over	

(b) A disabled veteran is entitled to an exemption from taxation of $3,000 of the assessed value of property he owns and designates as provided by Subsection (f) of this section if the veteran,

(1) is 65 years of age or older and has a disability rating of at least 10 percent;

(2) Is totally blind in one or both eyes; or

(3) has lost the use of one or more limbs.

(c) If a disabled veteran who is entitled to an exemption by Subsection (a) *or* (b) of this section dies, the veteran's surviving spouse is entitled to an exemption from taxation of a portion of the assessed value of a properly the spouse owns and designates as provided by Subsection (f) of this section. The amount of the exemption is the amount of the veteran's exemption at

time of death. The spouse is entitled to an exemption by this subsection only for as long as the spouse remains unmarried. If the spouse does not survive the veteran, each of the veteran's surviving children who is younger than 18 years of age and unmarried is entitled to an exemption from taxation of a portion of the assessed value of a property the child owns and designates as provided by Subsection (f) of this section. The amount of exemption for each eligible child is computed by the number of eligible children.

(d) If an individual dies while on active duty as a member of the armed services of the United States:

(1) the individual's surviving spouse is entitled to an exemption from taxation of $2,500 of the assessed value of the property the spouse owns and designates as provided by Subsection (f) of this section; and

(2) each of the individual's surviving children who is younger than 18 years of age and unmarried is entitled to an exemption from taxation of a portion of the assessed value of a property the child owns and designates as provided by Subsection (f) of this section, the amount of exemption for each eligible child to be computed by dividing $2,500 by the number of eligible children.

(e) An individual who qualifies for more than one exemption authorized by this section is entitled to aggregate the amounts of the exemptions, except that:

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(1) a disabled veteran who qualifies for more than one exemption authorized by Subsection (a) and (b) of this section is entitled to only one exemption but may choose the greatest exemption for which he qualifies; and

(2) an individual who receives an exemption as a surviving spouse of a disabled veteran as provided by Subsection (c) of this section may not receive an exemption as a surviving child as provided by Subsection (c) or (d) of this section.

(f) An individual may receive an exemption to which he is entitled by this section against only one property, which must be the same for every taxing unit in which the individual claims the exemption. If an individual is entitled by Subsection (e) of this section to aggregate the amounts of more than one exemption, he must take the entire aggregated amount against the same property. An individual must designate on his exemption application form the property against which he takes an exemption under this section.

(g) An individual is not entitled to an exemption by this section unless he is a resident of this state.

(h) In this section:

(1) "Child" includes an adopted child or a child born out of wedlock whose paternity has been admitted or has been established in an legal action.

(2) "Disability rating" means a veteran's percentage of

disability as certified by the Veterans' Administration or its successor or the branch of the armed services in which the veteran served.

(3) "Disabled veteran" means a veteran of the armed services of the United States who is classified as disabled by the Veterans' Administration or its successor or the branch of the armed services in which the veteran served and whose disability is service-connected.

(4) "Surviving spouse" means the individual who was married to a disabled veteran or member of the armed services at the time of the veteran's or member's death.

Sec. 11.23. Miscellaneous Exemptions.

(a) Veteran's Organizations. A nonprofit organization that is composed primarily of members or former members of the armed forces of the United States or its allies and that is chartered or incorporated by the United States Congress is entitled to an exemption from taxation of each of the buildings (including the land that is reasonably necessary for use of, access to, and ornamentation of the buildings) and other property owned and primarily used by that organization if the property is not used to produce revenue or held for gain. Occasional renting of the post or chapter property for other nonprofit activities does not result in loss of the exemption provided by this subsection, an organization is a nonprofit organization if it is organized and operated in a way that does not result in the accrual of

distributable profits, realization of private gain from payment of compensation in excess of a reasonable allowance for salary or other compensation for services rendered, or realization of any other form of private gain.

(b) Federation of Women's Clubs. The Texas Federation of Women's Clubs is entitled to an exemption from taxation of the tangible property it owns if the property is not held for gain.

(c) Nature Conservancy of Texas. The Nature Conservancy of Texas, Incorporated, is entitled to an exemption from taxation of the tangible property it owns if the property is not held for gain, as long as the organization is a nonprofit corporation as defined by the Texas Non-Profit Corporation Act.

(d) Congress of Parents and Teachers. The Texas Congress of Parents and Teacher's is entitled to an exemption from taxation for state and county purposes of the buildings (including the land that is reasonably necessary for use of, access to, and ornamentation of the buildings) it owns and uses as its state headquarters.

(e) Private Enterprise Demonstration Associations. An association that engages exclusively in conducting nonprofit educational programs designed to demonstrate the American private enterprise system to children and young people and that operates under a state or national organization that is organized and operated for the same purpose is entitled to an exemption from taxation of the tangible property that it

owns and uses exclusively if it is reasonably necessary for the association's operation.

(f) Buffalo and Cattalo. A person is entitled to an exemption from taxation of the buffalo and cattalo he owns that are not held for gain and that are used in experimental breeding with cattle for the purpose of producing an improved strain of meat animal or kept in parks to preserve the species.

(g) Theater Schools. A corporation that is organized to promote the teaching and study of the dramatic arts is entitled to an exemption from taxation of the property it owns and uses in the operation of a school for the dramatic arts if:

(1) the corporation is organized as a nonprofit corporation as defined by the Texas Non-Profit Corporation Act;

(2) the corporation is not self-sustaining in any fiscal year from income other than gifts, grants, or donations;

(3) the corporation is exempt from federal income taxes;

(4) the school maintains a theater-school program with regular classes for at least four grades, formal textbooks and curriculum, an enrollment of 150 or more students during each of at least two semesters every calendar year, and a faculty substantially all of whom hold degrees in theater arts from an accredited school of higher education;

(5) the school offers apprenticeship or other practical training in theater management and operation for college students or offers similar training for playwrights, actors, and production personnel; and

(6) more than one-half of each season's theatrical productions for which admission is charged have significant literary merit of the character that contributes to the educational programs of secondary schools and schools of higher education.

(h) Repealed January 1, 1988.

(i) Community Service Clubs. An association that qualifies as a community service club is entitled to an exemption from taxation of the tangible property the club owns that qualifies under Article VIII, Section 2, of the constitution and that is not used for profit or held for gain. To qualify as a community service club for the purposes of this subsection, an association must:

(1) be organized to promote and must engage primarily in promoting:

(A) the religious, educational, and physical development of boys, girls, young men, or young women;

(B) the development of the concepts of patriotism and love of country; and

(C) the development of interest in community, national, and international affairs;

(2) be affiliated with a state or national organization of similar purpose;

(3) be open to membership without regard to race, religion, or national origin; and

(4) be operated in a way that does not result in accrual of distributable profits, realization of private gain resulting from payment of compensation in excess of a reasonable allowance for salary or other compensation for services rendered, or realization of any other form of private gain.

(j) Medical Center Development. All real and personal property owned by a nonprofit corporation, as defined in the Texas Nonprofit Corporation Act, and held for use in the development of a medical center area or areas in which the nonprofit corporation has donated land for a state medical, dental, or nursing school, and for other hospital, medical, and educational uses and uses reasonably related thereto, during the time remaining property is held for the development to completion of the medical center and not leased or otherwise used with a view to profit, is exempt from all ad valorem taxation as though the property were, during that time, owned and held by the state for health and educational purposes.

(k) Scientific Research Corporations. A nonprofit corporation as defined in the Texas Non-Profit Corporation Act is entitled to an exemption from taxation of the property it owns and uses in scientific research and educational activities for the benefit of one

or more colleges and universities. Use of property exempted by this subsection for purposes other than scientific research and education does not result in loss of the exemption of those other functions are incidental to use of the property for scientific research and education activities and benefit the scientific research corporation and the colleges or universities that it supports.

Sec. 11.24. Historic Sites.

The governing body of a taxing unit by official action of the body adopted in the manner required by law for official actions may exempt from taxation part or all of the assessed value of a structure and the land necessary for access to and use of the structure, if the structure is:

(1) designed as a Recorded Texas Historical Landmark by the Texas Historical Commission and by the governing body of the taxing unit; or

(2) designated as a historically significant site in need of tax relief to encourage its preservation pursuant to an ordinance or other law adopted by the governing body of the unit.

Sec. 11.251. Tangible Personal Property Transported Outside the State.

(a) In this section, "freeport goods" means property that under Article VIII Section 1-j, of the Texas Constitution is not taxable.

(b) A person is entitled to an exemption from taxation of the appraised value of that portion of the person's inventory or property consisting of freeport goods.

(c) The exemption provided by Subsection (b) is subtracted from the market value of the inventory or property determined Under Section 23.12 to determine the taxable value of the inventory or property.

(d) Except as provided by Subsections (f) and (g), the chief appraiser shall determine the appraiser shall determine the percentage of the market value of inventory or property owned by the property owner in the preceding calendar year that was contributed by freeport goods. The chief appraiser shall apply that percentage to the market value of the property owner's inventory or property for the current year to determine the appraised value of freeport goods for the current year.

(e) In determining the market value of freeport goods that in the preceding year were assembled, manufactured, repaired, maintained, processed, or fabricated in this state or used by the person who acquired or imposed the property in the repair or maintenance of aircraft operated by a certificated air carrier, the chief appraiser shall exclude the cost of equipment, machinery, or materials that entered into and became component parts of the freeport goods but were not themselves freeport goods or that were not transported outside the state before the expiration of 175 days after they were brought into this state by the property owner or acquired by the property owner in this state. For component parts held in bulk, the chief appraiser may use the average length of time a component part was held in this state by

the property owner during the preceding year in determining whether the component parts were transported out of this state before the expiration of 175 days.

(f) If the property owner was not engaged in transporting freeport goods out of this state for the entire preceding year, the chief appraiser shall calculate the percentage of cost described in Subsection (d) for the portion of the year in which the property owner was engaged in transporting freeport goods out of this state,

(g) If the property owner or the chief appraiser demonstrates that the method provided by Subsection (d) significantly understates or overstates the market value of the property qualified for exemption under Subsection (b) in the current year, the chief appraiser shall determine the market value of the freeport goods to be exempt by determining, according to the property owner's records and any other available information, the market value of those freeport goods owned by the property owner on January 1 of the current year, excluding the cost of equipment, machinery, or materials that entered into and became component parts of the freeport goods but were not themselves freeport goods or that were not transported outside the state before the expiration of 175 days after they were brought into this state by the property owner or acquired by the property owner in this state.

(h) The chief appraiser by written notice delivered to a property owner who claims an exemption under this section may require the property owner to provide copies of inventory or property records in order to

determine the amount and value of freeport goods. If the property owner falls to deliver the information requested in the notice before the 31st day after the date the notice is delivered to the property owner, the property owner forfeits the tight to claim or receive the exemption for that year. The exemption provided by Subsection (b) does not apply to a taxing unit that takes action to tax the property under Article VIII, Section 1-j, Subsection (b), of the Texas Constitution.

(j) Petroleum products as set forth in Article VIII, Section 1-1, of the Texas Constitution shall mean liquid and gaseous materials that are the immediate derivatives of the refining of oil or natural gas.

Sec. 11.27. Solar and Wind-Powered Energy Devices.

(a) A person is entitled to an exemption from taxation of the amount of appraised vale of his property that arises from the installation or constructing of a solar or wind-powered energy device that is primarily for production and distribution of energy for on-site use.

(b) The comptroller, with the assistance of the Texas Energy and Natural Resources Advisory Council, or its successor, shall develop guidelines to assist local officials in the administration of this section.

(c) In this section:

(1) "Solar energy device" means an apparatus designed or adapted to convert the radiant energy from the sun, including energy imparted to plants

through photosynthesis employing the bioconversion processes of anaerobic digestion, gasification, pyrolysis, or fermentation, but not including direct combustion, into thermal, mechanical, or electrical energy; to store the converted energy, either in the form to which originally convened or another form; or to distribute radiant solar energy or the energy to which the radiant solar energy is converted.

(2) "Wind-powered energy device" means an apparatus designed or adapted to convert the energy available in the wind into thermal, mechanical, or electrical energy; to store the converted energy, either in form to which originally converted or another form; or to distribute the converted energy.

Sec. 11.271. Offshore Drilling Equipment Not in Use.

An owner or lessee of a marine or mobile drilling unit designed for offshore drilling of oil or gas wells is entitled to an exemption from taxation of the drilling unit if the drilling unit:

(1) is being stored in a county bordering on the Gulf of Mexico or on a bay or other body of water immediately adjacent to the Gulf of Mexico;

(2) is not being stored for the sole purpose of repair or maintenance; and

(3) is not being used to drill a well at the location at which it is being stored.

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Sec. 11.29. Intracoastal Waterway Dredge Disposal Site.

(a) A person is entitled to an exemption from taxation of land that the person owns and that has been dedicated by recorded donated easement dedicating said land as a disposal site for depositing and discharging materials dredged from the main channel of the Gulf Intracoastal Waterway by or under the direction of the state or federal government.

(b) An exemption granted under this section terminates when the land ceases to be used as an active dredge material disposal site described by Subsection (a) of this section and is no longer dedicated for that purpose.

Sec. 11.30. Nonprofit Water Supply or Wastewater Service Corporation.

A corporation organized under Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933 (Article 1434a, Vernon's Texas Civil Statutes), that provides in the bylaws of the corporation that on dissolution of the corporation the assets of the corporation remaining after discharge of the corporation's indebtedness shall be transferred to an entity that provides a water supply or wastewater service, or both, that is exempt from ad valorem taxation is entitled to an exemption from taxation of property that the corporation owns and that is reasonably necessary for and used in the operation of the corporation:

(1) to acquire, treat, store, transport, sell, or distribute water; or

(2) to provide wastewater service.

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Sec. 23.13. Taxable Leaseholds.

A taxable leasehold or other possessory interest in real property that is exempt from taxation to the owner of the estate or interest encumbered by the possessory interest is appraised at the market value of the leasehold or other possessory interest. However, the appraised value may not be less than the total rental paid for the interest for the current tax year.

Sec. 25.07. Leasehold and Other Possessory Interests in Exempt Property.

(a) Except as provided by Subsection (b) of this section, a leasehold or other possessory interest in real property that is exempt from taxation to the owner of the estate or interest encumbered by the possessory interest shall be listed in the name of the owner of the possessory interest if the duration of the interest may be at least one year.

(b) Except as provided by Subsections (b) and (c) of Section 11.11 of this code, a leasehold or other possessory interest in exempt property may not be listed if:

(1) the property is permanent university fund land;

(2) the property is county public school fund agricultural land;

(3) the property is a part of a public transportation facility owned by an incorporated city or town and:

(A) is an airport passenger terminal building or a building used primarily for maintenance of

aircraft or other aircraft services, for aircraft equipment storage, or for air cargo;

(B) is an airport fueling system facility;

(C) is in a foreign-trade zone:

(i) that has been granted to a joint airport board under Chapter 129, Acts of the 65th Legislature, Regular Session, 1977 (Article 1446.8, Vernon's Texas Civil Statutes);

(ii) the area of which in the portion of the zone located in the airport operated by the joint airport board does not exceed 2,500 acres; and

(iii) that is established and operating pursuant to federal law; or

(D)

(i) is in a foreign trade zone established pursuant to federal law after June 1, 1991, which operates pursuant to federal law;

(ii) is contiguous to or has access via a taxiway to an airport located in two counties, one of which has a population of 500,000 or more according to the federal decennial census most recently

preceding the establishment of the foreign trade zone; and

(iii) is owned, directly or through a corporation organized under the Development Corporation Act of 1979 (Article 5190.6, Vernon's Texas Civil Statutes), by the same incorporated city or town which owns the airport;

(4) the interest is in a part of a park, market, fairground, or similar public facility that is owned by an incorporated city or town; or

(5) the interest involves only the right to use the property for grazing or other agricultural purposes.

APPENDIX B —VERNON'S TEXAS CODES ANNOTATED, CIVIL PRACTICE AND REMEDIES

Sec. 37.001 Definition.

In this chapter, "person" means an individual, partnership, joint-stock company, unincorporated association or society, or municipal or other corporation of any character.

Sec. 37.002. Short Title, Construction, Interpretation.

(a) This chapter may be cited as the Uniform Declaratory Judgments Act.

(b) This chapter is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.

(c) This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Sec. 37.003 Power of Courts to Render Judgment; Form and Effect.

(a) A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for.

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(b) The declaration may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final judgment or decree.

(c) The enumerations in Sections 37.004 and 37.005 do not limit or restrict the exercise of the general powers conferred in this section in any proceeding in which declaratory relief is sought and a judgment or decree will terminate the controversy or remove an uncertainty.

Sec. 37.006 Parties

(a) When declaratory relief is sought, all person who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding.

(b) In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.

Supreme Court, U.S.
FILED
FEB 25 1994
OFFICE OF THE CLERK

(4)

No. 93-1206

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

BEXAR COUNTY APPRAISAL REVIEW BOARD
and BEXAR COUNTY APPRAISAL DISTRICT,
PETITIONERS

v.

FIRST BAPTIST CHURCH OF SAN ANTONIO
and VALERO REALTY COMPANY,
RESPONDENTS

On Petition for Writ of Certiorari to the Fourth Court of Appeals District of Texas, San Antonio

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION and APPENDIX, VOL. III

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1994

Questions Presented for Review

Petitioners' substantive questions of law have been presented for review and addressed in their *Petition for Writ of Certiorari*. This *Reply Brief* addresses only the jurisdictional questions first raised in *Respondents' Brief in Opposition* contesting Petitioners' standing to challenge the constitutionality of a state statute.

PARTIES TO THE PROCEEDINGS

Petitioners:

A. Bexar County Appraisal Review Board (a political subdivision of the State of Texas);

B. Bexar County Appraisal District (Walter Stoneham, Chief Appraiser), a political subdivision of the State of Texas.

Respondents:

A. First Baptist Church of San Antonio, a non-profit religious organization;

B. Valero Realty Company, a Delaware corporation a wholly owned subsidiary of Valero Energy Corporation, a Delaware corporation.

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OPINION OF THE COURT BELOW

The opinion of the Texas Court of Appeals is reported at 846 S.W.2d 554 (Tex. App. - San Antonio 1993, writ denied). (App. Vol. I, p. 1a.) The Order of the Texas Supreme Court, dated June 3, 1993, denying discretionary review of the Fourth Court of Appeals' decision on remand on the federal questions is unreported. (App. Vol. II, p. 52a.) The Order of the Texas Supreme Court dated October 27, 1993, denying Petitioners' Motion for Rehearing is unreported. (App. Vol. II, p. 54a.)

JURISDICTIONAL STATEMENT
(Restated)

The Texas Court of Appeals directly addressed the same federal questions presented to this Court for review. In so doing, the Texas Court decided these questions in a manner repugnant to the Constitution and in a way that directly conflicts with the decisions of this Court. (App. Vol. I, pp. 3a-7a.) The Texas Supreme Court refused to review the Appeal Court's decision. (App. Vol. II, pp. 52a-55a.)

Accordingly, jurisdiction is invoked pursuant to *28 U.S.C. §1257* and U.S. Sup.Ct. Rule 10.1(c), *Considerations Governing Review of Writ of Certiorari*, 28 U.S.C.

STATEMENT OF THE CASE

Respondents have misstated or mischaracterized the following facts under their Statement of the Case.

Respondents have characterized the parking lots in question as "the Church's two primary parking lots". (*Respondents' Brief in Opposition*, p. 3) The record reflects, however, that the Church owns other parking lots, next to the sanctuary, which the Church does not lease to Valero or otherwise use for commercial purposes. These sanctuary lots are exempt from property taxes.

Respondents then state that "all income" derived from the Church's "arrangement with Valero" is "devoted to the upkeep and maintenance of the Church complex as a whole". This is a misstatement. The Valero lease requires that Valero be responsible for all upkeep and maintenance on the parking lots it leases from the Church. Respondents maintain that in each of the tax years in question the Church was required to pay the taxes due the various taxing units. Under the terms of the lease, the Church was required to pay very little tax; Valero was the party required to pay the majority of the taxes due on the property. (App. Vol. I, p. 12a, n.6.)

JURISDICTIONAL ARGUMENTS

Petitioners Are The Proper Parties To Challenge The Constitutionality Of The State's Tax Exemption Laws.

The Appraisal District, through its Chief Appraiser, is specifically charged by state statute with enforcing the exemption laws of this state. *Tex. Tax Code Ann. §11.45(a) (Vernon 1992)* (App. Vol. II, p. 102a) Similarly, the Appraisal Review Board has a duty under *Tex. Tax Code Ann.* §41.01(5) (Vernon Supp. 1994) (App. Vol. III, p. 105a) to determine whether exemptions have been improperly granted.

Texas Courts Have Specifically Upheld The Authority Of The State's Appraisal Districts And Appraisal Review Boards To Challenge The Constitutionality Of The Tax Laws They Are Statutorily Bound To Enforce.

The Texas Court of Appeals in *Aransas County Appraisal Review Bd. v. Texas Gulf Shrimp Co.*, 707 S.W.2d 186 (Tex. App. - Corpus Christi 1986, writ ref'd n.r.e.), specifically rejected the same standing arguments Respondents raise here. The Court, holding that the appraisal authorities were the proper parties to challenge the constitutionality of the *Property Tax Code*, stated:

> [t]o hold otherwise, in reality, would leave no other likely party to challenge unconstitutional exemption statutes. Certainly the taxpayers

> receiving the exemption would not be likely to bring such a challenge...
>
> *Aransas County*, 707 S.W.2d at 196. (emphasis added)

Similarly, in *Nueces County Appraisal Dist. v. Corpus Christi Peoples Baptist Church, Inc.*, 860 S.W.2d 627 (Tex. App. - Corpus Christi 1993, no writ) the church argued, as Respondents do here, that the Appraisal District, as an agent or political subdivision of the State, did not have standing to challenge the constitutionality of one of the provisions of the State's *Property Tax Code*. The court held:

> ...appellants are the proper parties to bring such a challenge, inasmuch as these entities are the ones charged with duties under §11.433 (*Late Application for Religious Exemptions*) which would effectuate an unconstitutional legislative scheme. We hold that the County (Appraisal District, Appraisal Review Board, and County) has standing to bring this constitutional attack.
>
> *Nueces County*, 860 S.W.2d at 630. (parentheticals added).

Finally, the Texas Supreme Court in *City of Weatherford v. Parker County*, 794 S.W.2d 33 (Tex. 1990) upheld the right of a school district, as a political subdivision, to challenge a provision of the *Property Tax Code* as unconstitutional.

Petitioners Have No Duty To Notify The Texas Attorney General Of A Constitutional Issue Raised In The Required Statutory Manner.

Respondents claim Petitioners, in order to "properly challenge" the constitutionality of a state statute, must notify the Texas Attorney General of their challenge through a Declaratory Judgment proceeding. (*Respondents' Brief in Opposition* p. 4.) Petitioners have no such duty. Petitioners properly raised and preserved the federal questions decided by the Texas Court of Appeals because:

(1) The *Property Tax Code* is the exclusive statutory remedy to protest any of the Code's provisions. §42.09, *Tex. Tax Code Ann.* (Vernon 1992) (App. Vol. III, p. 105a.) The *Property Tax Code* imposes no duty on

Petitioners to notify the Texas Attorney General when the constitutionality of a statute is raised in a statutory proceeding brought under the *Property Tax Code*. See, *Alexander Ranch, Inc. v. Central Appraisal Dist.*, 733 S.W.2d 303 (Tex. App. - Eastland 1987, writ ref'd n.r.e.), *certiorari denied* 108 S.Ct. 2005, 486 U.S. 1026, 100 L.Ed.2d 236, where the taxpayer claimed a provision of the *Property Tax Code* violated of the Fourteenth Amendment to the United States Constitution. The Appraisal District challenged the taxpayer's right to do so because the lawsuit was not filed under the Uniform Declaratory Judgments Act. *Tex. Civ. Prac. & Rem. Code Ann.* §37.001 et seq. (Vernon 1986) (Respondents' App. B, pp. 44a-45a.) The Attorney General was not notified of the constitutional challenge. The Court held that since the taxpayer filed a statutory petition, as specifically required by the *Property Tax Code*, "no notice to the Attorney General was required." *Alexander Ranch*, 733 S.W.2d at 305.

(2) Even if state law required Petitioners to file a Declaratory Judgment action, notification to the State's Attorney General is required only where the statute is alleged to be unconstitutional on its face. Petitioners' constitutional challenges were raised in an "as applied" argument.

(3) Petitioners, in advancing their "as applied" arguments in state court, were entitled to rely on state law which requires state courts to interpret statutes in a constitutional manner. Code Construction Act, Chapter 311, *Tex. Gov't Code Ann.* §§311.021 and 311.023 (Vernon's 1988) (App. Vol. III, p. 106a.)

The Texas Court Of Appeals Rejected Respondents' Jurisdictional Arguments In This Case.

All of Respondents' arguments regarding jurisdiction and standing issues were raised by Respondents in their Brief to the Court of Appeals. These reply points of error were incorporated into Respondents' First Cross Point No. 1, asserting that Petitioners' constitutional arguments were brought frivolously and

seeking to have the court impose attorney's fees. These arguments were addressed and rejected by the Texas Court of Appeals when it overruled Respondents' Cross Points of Error on those issues (App. Vol. I, p. 17a.) Since the state courts declined to acknowledge Respondents' claims that Petitioners' constitutional challenges were infirm on jurisdictional grounds, those same claims do not present any barrier to this Court's jurisdiction to consider Petitioners' constitutional challenges here. These types of jurisdictional infirmities are analogous to those asserted against the Petitioner in *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979), which this Court overruled.

Petitioners Have A Direct Interest In The Outcome Of This Case; If The Court Of Appeal's Decision Stands, Petitioners Will Not Be Able To Enforce The Laws They Are Legally Bound To Uphold.

Petitioners have statutory duties under the *Property Tax Code* to ensure that exemptions are granted properly and in accordance with the law. *Tex. Tax Code Ann.* §§11.43(h)(i) (Vernon Supp. 1994) (App. Vol. III, p. 104a), 11.45(a) (Vernon Supp. 1994) (App. Vol. II, p. 102a) and 41.01(5) (Vernon Supp. 1994) (App. Vol. III, p. 105a.) Petitioners' representatives are required to take an oath to uphold the State and Federal Constitutions. *Tex. Const. art. XVI, §1* (App. Vol. III, pp. 103a-104a.) Further, Petitioners are specifically given the right to enforce the provisions of the property tax laws through the courts. §42.28 of the *Tex. Tax Code Ann.* (Vernon 1992) (App. Vol. III, p. 106a.) Petitioners, as a result of their statutorily imposed duties are directly affected by the outcome of this case. If the decision of the Texas Court of Appeals is allowed to stand, Petitioners will be unable to enforce the state's property tax exemption statutes for religious properties in a manner consistent with First Amendment principles.

This Court and Circuit Courts have recognized that, in certain instances, political subdivisions do have standing to challenge the constitutionality of a state statute or its application when they are directly affected in their ability to enforce or carry out their statutory and constitutional duties. *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923 (1968); *Akron Board of*

Education v. State Board of Education, 490 F.2d 1285 (6th Cir. 1974); *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979). (applying general principles of federal standing requirements to a Texas school district, and distinguishing *Williams v. Mayor of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Newark v. New Jersey*, 262 U.S. 192, 43 S.Ct. 539, 67 L.Ed. 943 (1923); *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923) line of cases and descendent cases of *Trustees of Dartmouth College v. Woodward*, 174 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), cited in *Respondents' Brief in Opposition* at pg. 5).

Here, Petitioners are involved in an actual controversy which directly affects their ability to perform their statutory duties in conformance with the laws they are charged with enforcing. Therefore, Petitioners have a "personal stake" in the outcome of this litigation.

This Court Has Jurisdiction To Review State Court Decisions Which Interpret Federal Questions Of Law In A Manner Repugnant To The Constitution.

Petitioners, as noted in their *Petition for Certiorari* and the Appendices attached thereto, properly raised their federal questions in the trial court and brought these questions forward at every stage of the appellate process. These federal questions were specifically addressed by the Texas Court of Appeals on remand by the Texas Supreme Court. As stated in *Raley v. State*, 360 U.S. 423, 436, 79 S.Ct. 1257, 1265 (1959), there can be no question as to the proper preservation of a federal claim when the highest state court passes on it. Further, even if it could be said Petitioners failed to meet federal standing requirements in the state court, this Court would still have grounds to review this case. See, *Asarco, Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989), holding that this court may exercise federal jurisdiction where the lower court's judgment causes direct injury to the parties who petition for review and the requisites of a case or controversy are met. Id. at 623-624.

CONCLUSION

Petitioners have met all of the procedural and jurisdictional prerequisites for this Court to grant *Certiorari* on the federal questions presented. The Texas Court of Appeals failed to properly apply the standards in *Walz v. Tax Commission*, 397 U.S. 664 (1970). Consequently, the decision of the Court of Appeals conflicts with *Walz*, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989). On accepting review, this Court will have an opportunity to restrain religious organizations from using *Walz* and the First Amendment as authority to engage in commercial activities without any tax obligations; an opportunity denied this Court in *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 316 F. Supp. 1116 (S.D. Fla. 1970) *cert. withdrawn* 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972).

Respectfully Submitted,

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Constitution of the State of Texas. Article XVI, §1. Official Oath.

Sec. 1. (a) Members of the Legislature, and all other elected officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God."

(b) Each member of the Legislature and all other elected officers, before taking the Oath or Affirmation of office prescribed by this section and entering upon the duties of office, shall subscribe to the following statement:

"I, _____, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected so help me God."

(c) The Secretary of State, and all other appointed officers, before entering upon the duties of their offices, shall take the following Oath or Affirmation:

"I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God."

(d) The Secretary of State, and all other appointed officers, before taking the Oath or Affirmation of office prescribed by this section and entering upon the duties of office, shall subscribe to the following statement:

"I, _____, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, or promised to pay, contributed, or promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward to secure my appointment or confirmation thereof, so help me God."

(e) Members of the Legislature and all other elected officers shall file the signed statement required by Subsection (b) of this section with the Secretary of State before taking the Oath or Affirmation of office prescribed by Subsection (a) of this section.

(f) The Secretary of State and all other appointed officers shall file the signed statement required by Subsection (d) of this section with the Secretary of State before taking the Oath or Affirmation of office prescribed by Subsection (c) of this section.

Vernon's Texas Codes Ann. Tax Code, Title 1
§ 11.43. Application for Exemption

(h) If the chief appraiser learns of any reason indicating that an exemption previously allowed should be canceled, he shall investigate. If he determines that the property should not be exempt, he shall cancel the exemption and deliver written notice of the cancellation within five days after the date makes the cancellation.

(i) If the chief appraiser discovers that an exemption that is not required to be claimed annually has been erroneously allowed in any one of the five preceding years, the chief appraiser shall add the property or appraised value that was erroneously exempted for each year to the appraisal roll as provided by Section 25.21 of this code for other property that escapes taxation. If an exemption that was erroneously allowed did not apply to all taxing units in which the property was located, the chief appraiser shall note on the appraisal records, for each prior year, the taxing units that gave the exemption and are entitled to impose taxes on the property or value that escaped taxation.

Vernon's Texas Codes Ann. Tax Code, Title 1
§ 41.01. Duties of Appraisal Review Board

The appraisal review board shall:

(1) determine protests initiated by property owners;

(2) determine challenges initiated by taxing units;

(3) correct clerical errors in the appraisal records and the appraisal rolls;

(4) act on motions to correct appraisal rolls under Section 25.25;

(5) determine whether an exemption or a partial exemption is improperly granted and whether land is improperly granted appraisal as provided by Subchapter C, D, or E, Chapter 23; and (footnote omitted)

(6) take any other action or make any other determination that this title specifically authorizes or requires.

Vernon's Texas Codes Ann. Tax Code, Title 1
§ 42.09. Remedies Exclusive.

(a) Except as provided by Subsection (b) of this section, procedures prescribed by this title for adjudication of the grounds of protest authorized by this title are exclusive, and a property owner may not raise any of those grounds:

(1) in defense to a suit to enforce collection of delinquent taxes; or

(2) as a basis of a claim for relief in a suit by the property owner to arrest or prevent the tax collection process or to obtain a refund of taxes paid.

(b) A person against whom a suit to collect a delinquent property tax is filed may plead as an affirmative defense:

(1) if the suit is to enforce personal liability for the tax, that the defendant did not own the property on which the tax was imposed on January 1 of the year for which the tax was imposed; or

(2) if the suit is to foreclose a lien securing the payment of a tax on real property, that the property was not located within the boundaries of the taxing unit seeking to foreclose the lien on January 1 of the year for which the tax was imposed.

(c) for purposes of this section, "suit" includes a counterclaim, cross-claim, or other claim filed in the course of a lawsuit.

Vernon's Texas Codes Ann. Tax Code, Title 1
§ 42.28. Appeal of District Court Judgment

A party may appeal the final judgment of the district court as provided by law for appeal of civil suits generally, except that an appeal bond is not required of the chief appraiser, the county, the comptroller, or the commissioners court.

Vernon's Texas Codes Ann. Government, Title 3
Chapter 311, §311.021. Intention in Enactment of Statutes

In enacting a statute, it is presumed that:

(1) compliance with the constitutions of this state and the United States is intended;

(2) the entire statute is intended to be effective;

(3) a just and reasonable result is intended;

(4) a result feasible of execution is intended; and

(5) public interest is favored over any private interest.

Vernon's Texas Codes Ann. Government, Title 3
Chapter 311, § 311.023. Statute Construction Aids

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

(1) object sought to be attained;

(2) circumstances under which the statute was enacted;

(3) legislative history;

(4) common law or former statutory provisions, including laws on the same or similar subjects;

(5) consequences of a particular construction;

(6) administrative construction of the statute; and

(7) title (caption), preamble, and emergency provision.